COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

DIFFÉREND TERRITORIAL

(JAMAHIRIYA ARABE LIBYENNE/TCHAD)

VOLUME VII

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

TERRITORIAL DISPUTE

(LIBYAN ARAB JAMAHIRIYA/CHAD)

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La présente affaire, inscrite au rôle général de la Cour sous le numéro 83 le 3 septembre 1990, a fait l'objet d'un arrêt rendu le 3 février 1994 (*Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 6).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant:

Volume I. Compromis; mémoire de la Jamahiriya arabe libyenne.
Volume II. Mémoire de la Jamahiriya arabe libyenne *(suite)*.
Volume III. Mémoire du Tchad.
Volume IV. Contre-mémoire de la Jamahiriya arabe libyenne.
Volume V. Contre-mémoire du Tchad.
Volume VI. Réplique de la Jamahiriya arabe libyenne; réplique du Tchad.
Volume VII. Comptes rendus d'audience.

*

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Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios: outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2013.

This case, entered on the Court's General List on 3 September 1990 under number 83, was the subject of a Judgment delivered on 3 February 1994 (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6).

The documents relating to the case are being published in the following order:

Volume I. Special Agreement; Memorial of the Libyan Arab Jamahiriya.
Volume II. Memorial of the Libyan Arab Jamahiriya *(continuation)*.
Volume III. Memorial of Chad.
Volume IV. Counter-Memorial of the Libyan Arab Jamahiriya.
Volume V. Counter-Memorial of Chad.
Volume VI. Reply of the Libyan Arab Jamahiriya; Reply of Chad.
Volume VII. Verbatim Records of the Hearings.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties; that has been done here, except when the technical quality of certain annexed documents was not sufficient for them to be published.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2013.

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CR 93/14

International Court
of Justice
THE HAGUE

Cour internationale
de Justice
LA HAYE

YEAR 1993

Public sitting

held on Monday 14 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le lundi 14 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Advisers and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Adviser and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corten, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Secretariat services will be provided to the delegation by:

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. The Court sits today for the purpose of hearing the oral arguments of the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad in the case concerning the *Territorial Dispute* which they have agreed to refer to it for settlement.

And I note the presence in Court this morning of His Excellency Colonel Idriss Deby, President of the Republic of Chad, also the Foreign Minister of Chad.

Before proceeding, however, I must begin by welcoming to the bench three Judges who have still to make the solemn declaration required of them by the Statute of the Court.

My welcome is first addressed to Judge Géza Herczegh, whom we are pleased to have with us today. He was on 10 May elected by the Security Council and General Assembly of the United Nations to fill the vacancy left in January by the death of our colleague Judge Manfred Lachs.

Judge Herczegh is a noted internationalist and authority on international humanitarian law who, at the moment of his election, occupied the distinguished position of Vice-President of the Constitutional Court of the Republic of Hungary. I now call upon him to make the solemn declaration required of a new Member of the Court by Article 20 of the Statute, and would ask all those present to stand during the declaration.

Judge Herczegh.

Judge HERCZEGH: Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de judge en tout honneur et dévouement en pleine et parfaite impartialité et en toute conscience.

The PRESIDENT: Thank you Judge Herczegh. Please be seated.

I place on record the declaration made by Judge Géza Herczegh and declare him duly installed as a Member of the International Court of Justice.

I now have pleasure in welcoming to the bench for the purposes of this dispute the two judges *ad hoc* appointed by the respective Parties in accordance with Article 31, paragraph 3, of the Statute.

First in order of seniority the judge *ad hoc* chosen by the Libyan Arab Jamahiriya. I could well dispence with any introduction for one so familiar as Judge José Sette-Camara. After a distinguished career in the Brazilian diplomatic service and at the United Nations, he joined the Court in 1979, was its Vice-President from 1982 to 1985 and, before he left the Court last year, presided over the Chamber that gave Judgment in the case concerning *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, in whose maritime aspect Nicaragua was permitted to intervene. We welcome his back with us now in the new role of Judge *ad hoc*, which of course obliges him to make a new declaration. So I now call upon Judge Sette-Camara to make the solemn declaration required by Article 31, paragraph 6, and Article 20 of the Statute, and would ask all those present to stand.

Judge Sette-Camara.

Judge SETTE-CAMARA: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT: Thank you Judge Sette-Camara, Please be seated. I now turn to the judge *ad hoc* chosen in the present case by the Republic of Chad, Mr. Georges Abi-Saab, Professor of International Law at the Graduate Institute of International Studies in Geneva and one-time member of the Egyptian delegation to several diplomatic conferences.
Professor Abi-Saab is no stranger to this Court, since he has appeared before it as counsel and advocate and was chosen by the Republic of Mali to sit as judge *ad hoc* in the Chamber that resolved that State's *Frontier Dispute* with Burkina Faso. The Rules of Court require judges *ad hoc* to make a separate declaration in relation to each case in which they participate. I therefore call upon Professor Abi-Saab to make the solemn declaration required by Article 31, paragraph 6, and Article 20 of the Statute, and would ask all those present to stand.

Judge Abi-Saab.

Judge ABI-SAAB: Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de judge en tout honneur et dévouement en pleine et parfaite impartialité et en toute

conscience.

The PRESIDENT: Thank you Judge Abi-Saab. Please be seated.

I place on record the declarations made by Judges Sette-Camara and Abi-Saab and declare them duly installed as judges *ad hoc* in the *Territorial Dispute* case between the Libyan Arab Jamahiriya and the Republic of Chad.

Our esteemed colleagues, the late Judge and former President Manfred Lachs, died in the early hours of Thursday, 14 January. The Court was able to pay a tribute to his memory at a sitting of the Court that morning. It is fitting, however, that the opportunity should be taken this morning to have a further tribute from Judge Ago, our senior Judge, who shared then bench with Judge Lachs fro 14 of the 26 years of Judge Lach's membership of the Court. Judge Ago.

M. AGO : Monsieur le Président, vous m'avez prié, en ma qualité de "senior judge" et d'amis de longue date de Manfred Lachs, de prononcer aujourd'hui quelques paroles en souvenir de lui.

Vous ne vous attendez certes pas qu'à cette occasion je m'attache à évoquer les différerents aspects de la personnalité du savant, du maître, du diplomate et du juge disparu. Cela a d'ailleurs déjà été fait à d'autres occasions. Je me bornerai plutôt à rappeler brièvement quelques uns des souvenirs personnels qui se bousculaient dans ma mémoire, souvenirs nés lors de rapports qui, tout au long de notre vie, se sont intensifiés jusqu'à devenir une constante.

Je revois encore le jour où mon vieil ami le Professeur Paul Guggenheim me présenta à Genève un jeune professeur tout juste arrivé de Pologne. Il était déjà en charge du département des affaires juridiques et des traités du Gouvernement polonais. Nous étions en 1949 et l'occasion qui nous fit nous rencontrer était, si je me souviens bien, la préparation d'une réunion de la Fédération mondiale des Associations pour les Nations Unies. Nous fûmes d'ailleurs amenés peu après à nous réunir à Varsovie pour l'une de nos premières assemblées plénières.

Je parlerai alors longtemps avec Manfred Lachs et pus me rendre compte à quel point cet homme aimait sa Pologne natale et ses étudiants qui lui avaient remis la médaille d'or de leur association. Il n'ignorait pas, bien sûr, les difficultés dans lesquelles son pays se débattait et c'est avec d'autant plus d'enthousiasme qu'il se vouait à sa reconstruction et surtout à sa réaffirmation dans le cadre des rapports internationaux.

J'eus en 1958 le plaisir de recevoir Manfred Lachs à Rome. Il s'y trouvait pour un congrès. Et plus tard, en 1965, j'eus l'occasion de revenir à Varsovie et d'être chaleureusement reçu dans son petit appartement. C'était au moment où l'Institut de droit international tenait sa 52e session dans la capitale polonaise.

Ce fut à Genève, à l'occasion des conférences pour la codification du droit de la mer et puis de sa participation, de 1962 à 1966, à la Commission du droit international que nos rapports se firent plus assidus.

Mais ils continuèrent de s'intensifier même après son élection à la Cour, élection trois fois renouvelée entre 1969 et 1985, longue periode marquée de 1973 à 1976, par sa présidence. Que ce

soit à l'institut de droit international, ou au Curatorium de l'Académie de droit international où, pendant plus de vingt ans, nous nous sommes partagés la présidence, ou encore à la Cour, où, à partir de février 1979, je vins le rejoindre, notre collaboration se fit de plus en plus amicale. Bien sûr, nous n'étions pas toujours du même avis, mais nous eûmes toujours le plus grand respect pour nos opinions respectives.

Le travail en commun nous fit mieux connaître et fit qu'une réelle sympathie était née entre nous. Je me souviens d'un si agréable dîner que Manfred offrit l'été dernier à mon épouse Hanka et à moi-même à Scheveningen. Nous parlâmess longtemps de la ressemblance entre Cracovie, sa ville préférée, et certaines villes italiennes. Il était si vivant, si gai, si plein de projets que rien, à ce moment là ne laissait supposer la survenue brutale de la maladie qui, quelques mois plus tard, devait l'emporter.

Monsieur le Président, le 14 janvier 1993 j'ai perdu un ami, un ami très cher, la Cour a perdu le plus ancien de ses "senior judges", celui dont on écoutait la parole en dernier lieu, avant les prises de position de la présidence.

Son opinion était toujours écoutée avec la plus grande attention. La contribution qu'il apportait avec sa vaste culture juridique, avec sa mémoire extraordinaire, avec sa parole mesurée et convaincante, nous manquera cruellement. Je suis sûr que le souvenir de ses opinions pleines de sagesse, expression toujours renouvelée de l'équilibre inné de son jugement, sera longtemps présent à notre esprit et nous guidera souvent à l'avenir comme s'il était encore avec nous.

Je vous remercie, Monsieur le Président.

The PRESIDENT: Thank you very much, Judge Ago.

The Court was seised of the case before us today between the Libyan Arab Jamahiriya and the Republic of Chad in the following manner.

On 31 August 1990 the Libyan Arab Jamahiriya filed in the Registry a notification of an instrument entitled "Framework Agreement on the Peaceful Settlement of the Territorial Dispute between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad", concluded in Algiers on 31 August 1989. By this notification, Libya submitted to the Court the territorial

dispute with Chad and defined the question put to the Court in the following terms :

"In further implementation of the Accord-Cadre, and taking into account the territorial dispute between the Parties, to decide upon the limits of their respective territories in accordance with the rules of international law in the matter."

On 3 September 1990 the Republic of Chad filed an Application instituting proceedings against the Libyan Arab Jamahiriya, based on Article 2 (a) of the "Framework Agreement" and subsidiarily on Article 8 of a Franco-Libyan Treaty of Friendship and Good Neighbourliness of 10 August 1955. In its Application Chad requested the Court:

"to determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties".

Subsequently the Agent of Chad, by a letter of 28 September 1990, informed the Court that his Government had noted that:

"its claim coincides with that contained in the notification addressed to the Court on 31 August 1990 by the Libyan Arab Jamahiriya"

and considered that:

"Those two notifications relate to one single case, referred to the Court in application of the Algiers Agreement, which constitutes the Special Agreement, the principal basis of the Court's jurisdiction to deal with the matter."

At a meeting with representatives of the Parties held with President Ruda on 24 October 1990 it was agreed between the Agents that the proceedings in the case had in effect been instituted by two successive notifications of the special agreement constituted by the "Framework Agreement" of 31 August 1989 and that the procedure should be determined by the Court on that basis, pursuant to Article 46, paragraph 2, of the Rules of Court.

The same provision requires the parallel filing by each Party of a Memorial and a Counter-Memorial. The Court may also authorize the presentation of Replies, but only if it deems them to be necessary. In the presem case, having ascertained the views of the Parties, the Court did so authorize, and the Replies were duly filed by 14 September of last year, thus making the case ready for hearing.

Having ascertained the views of both Parties, the Court has decided to make copies of the pleadings and documents annexed, accessible to the public in accordance with Article 53, paragraph 2, of the Rules of Court.

I note the presence in the Court this morning of His Excellency Colonel Idriss Deby, President of the Republic of Chad. I also note the presence of the Foreign Minister of Chad and I note the presence in the Court of the Agent of the Libyan Arab Jamahiriya, Mr. Abdulati Ibrahim El-Obeidi, and of the Agent of the Republic of Chad, Mr. Abderahman Dadi. It has been agreed between them that the oral proceedings shall open with the presentation of argument on behalf of Libya. I therefore now call upon the Agent for Libya, Mr. El-Obeidi.

Mr. EL-OBEIDI: Mr. President, Members of the Court,

It is a great honour to appear on behalf of my country in this important case before the International Court of Justice. As the Court well knows, it is often difficult — sometimes impossible — for States to resolve territorial disputes between them without resort to some kind of arbitration of judicial settlement. It is all the more difficult in a case such as this. For here, one Party, Chad, claims there is a conventional boundary and that the dispute has already been settled, and the other Party, Libya, denies there is a conventional boundary and comes to the Court to determine a boundary.

I have the greatest pleasure, as the Agent of Libya, to see H.E. Idriss Deby, President of Chad, sitting here before the Court with Chad's distinguished delegation. We all know the heavy burdens that are borne by Chiefs of State these days, particularly in the region from which we both come. I am happy to say that Libya's leader, Colonel Kadhafi, fully shares this view. May I express the hope on behalf of Libya that the settlement of this territorial dispute in accordance with the principles and rules of international law will pave the way for even better relations between Libya and the State of Chad.

It is a pleasure for me, Mr. President, to be able to tell the Court that today relations between Libya and Chad are excellent. The peoples of Libya and Chad have had too many centuries of living together, or intermingling, to allow the misunderstandings and difficulties that grew out of the

turbulent period in Chad following its independence to continue. Only recently, on 20 November 1992, a broad agreement of general assistance and mutual co-operation between Libya and Chad was entered into. Its preamble stresses the friendly ties and good neighbourly relations between the two countries. It is a matter of pride for my people that, second to no other State, Libya has provided extensive economic assistance to Chad in their difficulties inherited from the colonial times, especially during their bitter civil war.

I should also inform the Court that less than a month ago, on 19 and 20 May, the Prime Minister of Chad paid a visit to Libya. In his official statement he emphasized the friendly relations between Libya and Chad and the ties that have existed between the two countries since time immemorial. Chad's Prime Minister spoke of the deep respect that the Chadian people have for their Libyan neighbours. I mention this today because I have the great honour, on behalf of my country, to tell the Court, in the presence of the President of Chad, that the Libyan people share these same feelings in regard to the people of Chad. The recent visit of Chad's Prime Minister was specifically referred to by him as proof of Chad's wish to continue and to strengthen the fraternal relations between Chad and Libya.

Assisting its neighbours has been Libya's policy ever since it had the good fortune of discovering oil. Before that — and I include the period when the 1955 Treaty was negotiated and signed with France — Libya was a poor country, one of the very poorest in the world. Even today, Libya's relative wealth arises from a resource that one day will be depleted. Libya remains poor in other ways. Its large landmass lacks adequate water supply; and its population is much smaller than that of its neighbours.

Libya's policy of assisting its neighbours was not motivated by the desire to appropriate the territory of a neighbour or to interfere in its affairs. It is inspired by the Koran, for wealth is regarded in the Koran as a trust from God, to be shared with fellow beings.

Libya has not occupied territory or seized resources belonging to any of its neighbours; it has not sought to imitate the behaviour of the Colonial Powers in this respect. But there have been unresolved questions as to just where Libya's sovereignty ends and its neighbour's sovereignty

begins. This was so as to the continental shelf lying between Libya and Tunisia and between Libya and Malta. And it has all along been so as between Libya and Chad.

When Libya expanded the reach of its governmental administration in the northern borderlands, starting in late 1972, it did so in order to save and protect the peoples living there — peoples who Libya considered to be Libyans. For their lives were at risk in the civil war raging in Chad and they were in immediate danger of starvation. Libya considered the lands on which these peoples lived to be part of Libya. Libya continues to believe this.

These activities of Libya were not opposed by Chad and were openly welcomed by the peoples of the region. The famous Tombalbaye letter of 28 November 1972, and the Treaties entered into between Libya and Chad on 23 December 1972 and 2 August 1974, confirmed that Libya's actions were not then considered by Chad — or by any faction in Chad — to be an invasion of Chad territory. At the very least, these events reflected the view that sovereignty over the territory in question was in dispute and had yet to be settled. The materials recently submitted by Chad last February, after the closure of the written pleadings, fully confirm this.

It is to settle this territorial dispute that Libya and Chad have come to the Court, just as Libya and Tunisia did over 10 years ago in the case of their dispute concerning the continental shelf being between them. In that case, Libya and Tunisia came together to the Court to settle the matter, and the Court did so with finality. Sine that time, Libya and Tunisia have fulfilled their obligations in accordance with the decision of the Court and have resumed brotherly relations, which that dispute had momentarily disturbed.

But beyond that, Libya and Tunisia have formed a joint venture covering the development and commercial exploitation of certain offshore areas lying on both sides of the line dividing the Libyan and Tunisian shelves that was established in carrying out the Court's Judgment. Not only did the Court in that case settle the dispute and restore peace to the region but its decision also opened the way to a mutually beneficial development of resources.

The decision of the Court in the Libya/Malta case was also peacefully settled with finality by the Court.

Once again, Libya returns to request the Court to settle a dispute concerning sovereignty — a territorial dispute between Libya and Chad. What Libya asks of the Court is to *settle* this dispute *with finality*. Libya asks the Court to *determine* the boundary. Libya has not the slightest doubt that the Court has the jurisdiction and possesses the competence to carry out this task; and Libya has no reservations about its own duty after the Court has rendered its decision in this case to observe the judgment both in letter and in spirit.

Mr. President, I am going to leave the presentation of Libya's legal case to Libya's counsel, led by colleague and good friend, Mr. Maghur. But there are several points that I must address here. In Chad's Memorial there appear certain statements whose tone and context Libya simply cannot accept. Not only do they fail to reflect the good relations existing between the peoples and the Governments of Libya and Chad, these accusations are wrong, and they are offensive. I very much hope that this kind of distasteful argument will not be repeated here so as to mar these proceedings.

Libya rejects outright the suggestion that, in challenging Chad's claimed boundary, Libya is contributing to the destabilization of Africa and its frontiers. I wish to make it clear that Libya believes firmly in the principle of the stability of boundaries. Libya and Chad have together brought this case to the Court to resolve the territorial dispute between them. There certainly is nothing destabilizing about that. Such action by African States can only promote the stability of boundaries in Africa.

But the stability of boundaries cannot be based on *false* boundaries, or on *myths* about boundaries invented by the Colonial Powers to serve their own interests. That was hardly what the African States agreed in their 1964 Cairo Declaration. If, as here, no boundary exists, the question of the stability of boundaries does not even exist.

Yet there seems to be a theme running through Chad's pleadings that the validity of the boundary Chad claims cannot be examined too closely, for to do so would be destabilizing. Chad seems to suggest that the Court's role is to rubber stamp what some States allegedly had come to assume was the boundary, largely on the basis of France's say-so. The argument also seems to be that what the official geographers of certain States, relying on French sources, said was the

boundary has to be accepted as the boundary. Of course, this line of argument completely ignores the fact that France itself in the past repeatedly sought to modify what it claimed to be the boundary.

Now I have the highest regard for the excellence of the French maps prepared by the French map agency, the IGN, as well as for maps prepared by the Geographer of the United States under the guidance of the State Department. I wish both Libya and Chad had such capabilities. But the official indications by those governmental agencies of where they regard international boundaries to lie is a matter dictated by their country's policies. Libya comes to the Court not for a political decision but for a decision based on the principles and rules of international law.

There is a second point I must address. Libya's claim is not arbitrarily conceived. Libya did not pick the 15° N latitude out of a hat. Perhaps Libya's claim to the Libya-Chad borderlands as far south as 15° N latitude came as a surprise to Chad's advisers. But they should not have been surprised. For this territorial dispute is not the doing of Libya and Chad. Its origins go back over 100 years. Libya's claim is solidly based on the rights asserted by the Ottoman Empire and by Italy in the past. It is entirely consistent with the history of this territorial dispute, which has never been resolved.

There is, however, a fundamental difference between the claims of the Parties. Unlike Chad, Libya does not say that the line defining Libya's claim was a recognized international boundary or is the only possible line. It is a claim line defining territory to which, in the absence of a conventional boundary, Libya believes it has the better claim to title.

This belief does not rest solely on what the Ottoman Empire or Italy did or had a right to claim. Libya believes that the peoples inhabiting the region within its claim line are Libyan peoples who had title to this territory before the arrival of the Ottomans, or the Italians, or the French. The Muslim tribes there were the Senoussi tribes who opposed the French invasion of their lands from the south and the Italian invasion from the north. No people in the region fought as valiantly as the Senoussi people against the foreign invaders.

Some of these tribes — the Awlad Sulaiman, the Qadhadfa tribe, which is the tribe of Colonel Muammar Kadhafi, and the Orfella — were, and still are Libyans. Tribes, such as the Toubou of

Tibesti, have for centuries lived and travelled and traded with the oases to the north of Cyrenaica and Fezzan, which are part of Libya.

The peoples of the Libyan/Chad borderlands inhabit regions north of what the French unfortunately referred to as *"le Chad utile"* — that is north of roughly 15° N latitude. It is true that the borderlands may be sparsely populated and the region may be economically poor. Of course, that is true of most of Libya. But there are people living there, in the borderlands, who in Libya's view, are Libyan people. Merely because the region is not rich in mineral resources — as was once believed — does not mean that the region should be considered useless and its people ignored. Yet that was the French colonial attitude, and the region was treated no better after Chad's independence. In fact it was ravaged by civil war. It is time that the inhabitants of the borderlands were given the attention and the care they deserve as human beings.

Three years ago, under the *Accord-Cadre* of 1989, Libya and Chad agreed to seek a *legal* — a *judicial* — solution to the territorial dispute. This reflects the fact that a hundred years of attempting to resolve the dispute at the *political-diplomatic* level had failed. Libya and Chad appear here today before the Court to settle this dispute with finality.

The central questions in this case — and they are legal questions — are, *first*, was there a conventional boundary east of Toummo on the critical date, the date of Libya's independence? *Second*, if not, where does that boundary lie? Libya does not believe that either Party is hindered from, or limited in, presenting its claim to the Court. The *Accord-Cadre* prescribes no such limitations.

I should like to add that in the attempt to present Libya's case as objectively as possible, it sometimes has been necessary for Libya to make what might appear as harsh judgments concerning the past conduct of other States. Libya implies by this no disrespect of the Government of any other State today. I think we all recognize that the colonial period in Africa was not one of the happiest moments in the history of mankind.

Before concluding, I must say a word about the letter President Tombalbaye wrote to Colonel Kadhafi in November 1972. But as Agent of Libya I can assure the Court that I have no

doubt that this letter was sent and received and that the contents of the copy we have of it are correct — no doubt whatsoever.

Let me end my remarks, Mr. President, by saying that Libya considers that, as an organ of the United Nations, the Court plays a vital role today in the peaceful settlement of disputes. In this sense, the Court's functions go beyond a narrow legal one, and in its decision the Court will surely address all the elements that may bear upon reaching a truly satisfactory and final resolution of this

dispute. Libya has full confidence that the Court will arrive at a settlement that will foster international peace and security, as well as justice, to use the words of Article 2, paragraph 3, of the Charter of the United Nations.

This concludes my opening remarks, Mr. President. I thank you and Members of the Court and I would ask now that Your Excellency call on Professor Bowett. Thank you very much.

The PRESIDENT: Thank you Mr. El-Obeidi. Professor Bowett.

Mr. BOWETT: Mr. President, Members of the Court, it is my task, in this early stage of the presentation of Libya's case, to assist you by giving a brief summary of that case. As you will have seen from the written pleadings, the history of this matter is long, at times very complex, and in some aspects inconclusive. It may help the Court, therefore, if I sketch out in summary fashion how Libya sees this case. This will, I hope, make the more detailed arguments which are to follow more easily understood.

A. The Principal Elements of the Libyan Case

There are *three* principal elements to Libya's case. The *first* is that to the south of Libya in the borderlands between Libya and Chad there never has been a defined boundary. The *second* is that title to these borderlands was never acquired by France: not by treaty, not by "occupation", and certainly not by conquest. So if France never had title, Chad never inherited any title from France. And the *third* element is that the title to these territories which certainly did exist — vested in the indigenous Senoussi tribes, and claimed on the international plane by the Ottoman Empire and then by Italy — has by law passed to Libya. Let me explain these three principal elements in a little more detail,

First, and foremost, Libya came into existence as an independent State in 1951 with no agreed, defined, "southern" boundary. Whilst it had other, settled boundaries to the east and the west, the fact was that no settled boundary existed between Libya and the territories of French colonial Africa to the south.

This is why Libya rejects entirely the accusation that it is defying the well-established

principle that newly-independent States must respect established boundaries. In the south of Libya — in the borderlands between Libya and the French colony of Chad — there was no established boundary. So that principle is not in issue, and no part of Libya's case represents a challenge to that principle.

If proof of that statement is needed, then it can be seen in the detailed refutation by Libya in its written pleadings of Chad's argument that a boundary had been established by treaty, or rather a series of treaties, long prior to independence. And this detailed refutation will in due course be developed in oral argument.

But there is additional evidence to hand, of a much simpler, and straightforward kind. This lies in the record of the discussions within the United Nations immediately prior to Libya's independence. The General Assembly, through the Interim Committee, began a study of the procedures to delimit the boundaries of Libya (Res. 289 (IV), Sect. C). The UN Secretariat, in a Memorandum of 27 January 1950, examined what boundaries were already delimited by treaty. The Secretariat's task was complicated by the fact that France provided some misleading information — referring to a non-existent treaty and a non-existent map — but the Secretariat concluded that, as regards the southern boundary, the matter was far from clear. And that view was endorsed by the General Assembly in resolution 392 of the Fifth Session. The Assembly determined that "the portion of its (Libya's) boundary with French territory not already delimited by international agreement be delimited, upon Libya's achievement of independence, by negotiation ...".

Thus, in 1950, France totally failed to convince the United Nations that this southern boundary was already delimited by treaty. And that part of the resolution could only have referred to the southern boundary, to the very boundary which is now before the Court.

1. The 1955 negotiations

Now in 1955 France and Libya did negotiate. They concluded the 1955 Treaty of Amity. The delegations were a strange contrast. On the one side were the French — experienced, well-equipped with documentary evidence of the whole history of the boundary, desperately keen to restore France's role in North Africa, and prepared to outmanoeuvre the Libyans, even if it meant

"bugging" their quarters. On the other side were the Libyans — totally inexperienced, lacking records and anyone with legal expertise in international matters.

Yet in the main the Libyans succeeded: they secured the withdrawal of french military forces from the Fezzan, which was undisputed Libyan territory. They paid a certain price, for in the 1956 Agreement Libya was forced to agree on a rectification of that part of the boundary which lay between Ghadamès and Ghât, so as to give the Edjele oil field to France. France refused to ratify the 1955 Agreement unless Libya agreed to this rectification. But that lay to the west, along the boundary with Algeria.

So far as the southern boundary was concerned, the position was simply this. Libya agreed in Article 3 of the 1955 Treaty to such boundaries with french territory as might result from the international agreements in force (*"qui résultent des actes internationaux en vigeur ..."*) and these agreements were listed in Annex I.

There is no question that in 1955 such agreements did exist as regards the boundaries with Tunisia and with Algeria. But as regards Chad to the south? That question remained to be examined.

Now there were, in fact, three possibilities. The first was that the treaties listed in Annex I did not, in fact, establish any boundary. The second possibility was that the treaties listed in Annex I did conclusively establish a boundary: we shall show that this was not so. And a third possibility was that Article 3 established a boundary *de novo*. This would mean that, even though the Parties recognised that no previous boundary existed, they agreed that a boundary should exist from 1955 onwards, along some line which might — or might not — emerge from the earlier treaties which did *not* establish a boundary.

Now the Court may feel that this third hypothesis is somewhat unlikely: indeed it is. What is more, if one looks carefully at the record of negotiations, the hypothesis becomes more than unlikely: it becomes absurd.

Consider the following facts. The Libyan delegation told the French that they were not in a position to discuss new boundaries: they were simply not equipped to undertake that task. And no

substantive discussion of this southern boundary occurred. The French delegation produced no map to show where the supposed southern boundary might lie: nor even the texts of the treaties which are now said to support such a boundary line.

As I said, the Libyans were inexperienced: but they were not complete fools! Can you imagine anyone in their right minds agreeing to a boundary when they have been shown nothing to support its existence, and do not even know where such a boundary might lie? As I have said, the hypothesis is absurd.

Now certainly the French were not fools either. So the question is, what were they trying to achieve? In fact the French tactics had been laid down in advance in advice given by the French Governor-General of French Equatorial Africa. He advised his Government *to avoid all discussion of the actual boundary line*, and to somehow get Libya to commit itself to the frontier resulting from the 1899 Anglo-French Declaration (ML, French Archives Annex, pp. 169-171).

Not to put too fine a point on it, the tactic was to trick the Libyans. It was to pretend that the 1899 Declaration really had established a frontier — and to avoid any discussion or debate. Now the trick had three fatal flaws. First, the 1899 Declaration did *not*, in fact, establish a frontier. Second, the Libyans did not fall for the trick, as the record shows. And, third, the trick would eventually be found out.

2. The fallacy of the pre-existing treaty boundary

The 1899 Franco-British Declaration could not possibly have determined a boundary — and, indeed, Chad does not argue that it did so in 1899. The French had never occupied the territory to the south of that line — they were still far to the south around Lake Chad. Nor had the British occupied the area to the north of the line — the British were established in the east, in Egypt and the Sudan. So the so-called "boundary" lay in territory neither occupied by, nor even known to, either Party. In fact, they were not even sure of the location of the Tibesti mountains.

Certainly they drew a line on the map — a line running south-east from a point where the 16° east line of longitude meets the Tropic of Cancer — but this was simply a bilateral agreement that France would never attempt to acquire territory north of this line. It did not purport to be a land

boundary between adjoining sovereigns, for neither Party had the slightest claim to sovereignty.

How, therefore, could such a line ever become a true boundary, binding on the territorial sovereigns?

Well, not by any process of recognition or acquiescence. The Ottoman Empire protested the 1899 Declaration from the start. The indigenous people, led by the Senoussi, fought the French tooth and nail. The Italians are suggested by Chad to have accepted this line in the 1902 Accords. But these 1902 Accords were not concerned with this southern boundary and, in any event, in 1902 Italy was not in a position to accept any boundary — for Italy had at that time no sovereignty in the area.

Now it is true that in 1919 a further Franco-British Convention redefined the line, changing it from a true south-east line to an east-southeast line — in effect adding a further 178,651 square kilometres to the French claim. But how could that reinforce the 1899 line? It was a different line; the territory did not belong to Great Britain to cede; the 1919 Convention was protested vigorously by Italy — which was now sovereign over the territory. Indeed, during the 1920s and 1930s Italy sought to negotiate a boundary with France, and the Italian claims make it clear that Italy accepted neither of the Anglo-French lines, neither the 1899 version nor the 1919 version. So the notion that somehow the 1899 line had been recognized or acquiesced in, is simply wishful thinking.

So where does that leave Chad's case? Well it really leaves only one remaining avenue of argument open. If there was no actual agreed treaty boundary, and no recognition or acquiescence in a line originating in a treaty, Chad is essentially left with only one argument. This is that France had acquired sovereignty over this territory by occupation: and it is this title which Chad has succeeded to.

3. The alleged French title based on "occupation"

The idea of a French title based on "occupation" faces an insurmountable obstacle. This is that it presupposes that the territory was *terra nullius*.

The Court will in due course hear about this territory in some detail. Essentially it is a vast territory, mainly desert and mountain, and inhabited by Muslim tribes who follow a pastoral, or nomadic life-style. In 1900, when the French first arrived at Lake Chad, these peoples had an undisputed title to their lands. The tribes acknowledged the sovereignty of the Ottomans and looked to the Caliph in Istanbul as their spiritual leader and as the sovereign ruler of the Islamic State of which they formed a part. And they also acknowledged the leadership and authority of the Senoussi. The tribes were well organized, into coherent societies. They had a social structure, a legal system, procedures for dispute settlement, a religion, schools, commercial links with Tripolitania, Fezzan and Cyrenaica to the north, and relative security: their lands were not *terra nullius*.

Their security was in due course shattered by the French military invasion. But in all the years during which France launched intermittent raids into this territory and established a few military posts, France never exercised any civil administration of the territory comparable to that which the Senoussi had established. So the notion that the territory was *terra nullius* before France arrived, and became effectively occupied after France arrived, has a special irony. The truth is that France never achieved the effective control which the Senoussi had exercised before their arrival, or even the degree of civil administration which the Ottoman Empire had exercised in the area. It is significant that, so long as the Ottomans remained in the borderlands, the French stayed south of the 15° line of latitude. It was only when the Ottomans withdrew, in 1913, that the French military forces began their sporadic raids into the borderlands north of 15° of latitude.

The consequence of this is clear. The idea of a French "occupation" is totally inappropriate. What we are dealing with, in reality, is a French claim to military conquest of lands to which title was already established.

The Court will in due course have the full story of the military conquest explained to it. For present purposes the point to be made is simply this. France had not militarily occupied these

borderlands prior to 1919. Indeed, the French re-entered Tibesti only in 1929, having withdrawn in 1916. And the very limited French military presence was not intended as a true occupation of the borderlands. There was no civil administration to accompany it, and hence no attempt to govern the territory. It was essentially a "buffer zone". The purpose was to protect the *"Tchad utile"* which lay to the south of the borderlands.

Moreover, as the Court is well aware, in 1919 and again in 1928 France entered into solemn treaty obligations *not* to acquire territory by military conquest. I refer, of course, to the obligations assumed by France under the Covenant of the League of Nations and the Pact of Paris. So, whatever may be the doubts over the effectiveness of the French military occupation, as a question of fact, the result, as a matter of law, was that France *could not acquire a valid title to these territories*. Accordingly, title remained with the indigenous peoples, and with Italy for purposes of representation on the international plane (as successor to the Ottoman Empire). And so the second basic proposition which is an essential element of Libya's case is that France did not occupy these borderlands. It did not do so in fact, and it could not do so as a matter of law, both because the lands were not *terra nullius* and because, after 1919, conquest was illegal.

4. The prior title to which Libya has succeeded

For the third basic element in Libya's case is not simply that a prior title existed in these borderlands, but that this title is now vested in Libya.

As I indicated, prior to 1912 that title lay with the indigenous tribes, organized by the Senoussi, and represented on the international plane by the Ottoman Empire. The attributes of sovereignty were shared by these three "partners" in a manner which suited these Islamic people.

The Court will hear, in considerable detail, how, within these borderlands, the whole range of governmental, administrative responsibilities were exercised either by the Ottoman representatives, or by the Senoussi, or by the tribes themselves through their traditional chiefs and leaders. Trade was protected and promoted, education was given, disputes were settled and the laws and customs of the tribes were enforced, religious instruction was given, wells were dug and protected — and so on.

As I have said, these lands were certainly not *terra nullius*: not by the standards of the day,

and not by the standards enunciated by this Court in the *Western Sahara* case. And so Libya utterly rejects Chad's argument that these lands were acquired by French military occupation.

The title to these territories was consistently asserted by the Ottoman Empire and after Italy had succeeded to the Ottomans in 1912 by Italy. Indeed, during the 1920s, Italy was to negotiate with France over the boundary in these borderlands, making claims which differed only slightly from the boundary settlement proposed by the vilayet of Tripoli in 1911.

Now, it is true that in 1935 the Mussolini/Laval Pact envisaged a boundary line which would have involved a considerable cession of Libyan territory to France. But that 1935 Treaty never entered into force. Italy declined to ratify this cession of territory when Mussolini discovered that, contrary to what he believed France had promised, France did not in fact support the Italian aggression against Ethiopia.

Thus, title remained where it had long rested — with the Senoussi tribes of the borderlands — and now with Italy; and no boundary was agreed.

And there the situation remained until, with Libya's independence in 1951, Libya succeeded to Italy. However, this was no formal State succession to territory. It was a succession not only to territory, but also to the peoples who inhabit these borderlands.

For the tribes are Muslim and Senoussi — some are tribes which originated from further north in territory indisputably Libyan, like the Awlad Sulaiman, and some, like the Toubou, were tribes whose links had always been with the north. The Senoussi are unquestionably Libyan: their struggle for Libyan independence lasted for over 50 years. And the Ottoman title passed first to Italy, and then to Libya. So with the independence of Libya in 1951 Libya succeeded not only to Italy's title, but to the claims and rights of both the Senoussi and the tribes which had persisted throughout all the changes in the international representation of the territory.

5. The Court's task

This brings me briefly to the task of the Court. In one sense this is much simplified — for neither Party contests the Court's jurisdiction. True, the Parties see the task rather differently. For Chad, it is simply a matter of confirming the existing line resulting from certain treaties. For Libya, it is first and foremost a dispute over title — a "territorial" dispute, rather than a "boundary" dispute. Certainly, the Court will have to determine the boundary, but this comes as a secondary or consequential task once title is decided. The boundary represents the limits of the area of entitlement.

Libya does not pretend that, once title is decided, the task of defining the boundary is simple. With the French presence prior to 1919 so intermittent and widely dispersed, it may not be self-evident at all points along the boundary where French control extended to, at that point in time, and where the previous title to the territory might be argued to have been lost.

But the task is clearly a legal one, a legal task with which the Court is fully competent to deal. Attribution of territory is no less a legal task than delimitation of boundaries. That must have been the view of the Permanent Court in the *Legal Status of Eastern Greenland* case, and of this Court in the *Minquiers* and *Ecrehos* case.

And there is a sense in which Chad seeks to restrict the Court's competence, even though not formally objecting to that competence. This arises from Chad's characterization of Libya's claim as "political" — implying, I suppose, that it is not a "legal" one.

There is really no need for me to spend any time on this accusation. Why a dispute over attribution of territory, or title, is "political", but a more limited boundary dispute is "legal", escapes me. The law provides no support for that proposition. Only two years ago this Court faced a situation, in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* where, over quite large areas, no boundary existed. So the Court dealt with attribution and then, consequentially, delimitation as a normal judicial task. And neither Party treated the other's claim as "political".

But there is a more serious aspect to Libya's accusation. This lies in the charge that, if the

Court were to entertain Libya's claims, the stability of Libya's other boundaries, and even of other States' boundaries elsewhere in the world, will be threatened.

I trust the Court will not take fright at this "bogeyman". So far as Libya is concerned, as the Agent has already stated, Libya has no wish to challenge existing established boundaries. As for the rest of the world, that same principle of the sanctity of established boundaries must be respected. But we cannot pretend that everywhere, throughout the world, the boundaries are already established and protected by law. Whether we like it or not, the fact is that history has not always produced clear, recognized boundaries. There remain locations, in nearly every continent, where for one reason or another territorial disputes do exist, and established boundaries do not.

It is for this reason that this case is an important precedent. The Court now has the opportunity to demonstrate that the law does provide a means of resolving disputes over title and of providing boundaries *de novo*. There are legal criteria to achieve this, and, in applying them, the Court can demonstrate that the rights and interests of peoples can be safeguarded by the law, and were not simply obliterated by colonialism.

Mr. President, I need detain the Court no longer with this brief introduction. It may help both the Court and our colleagues representing Chad if I indicate the order in which Libya's oral argument will follow.

B. The Order of Oral Argument

The next part of the argument will be devoted to examining the position on the critical date — the status quo, as it were.

Mr. Maghur will begin by commenting on the new documents produced by Chad after the closure of the written pleadings, and he will then turn to the question whether, in the actual circumstances of the negotiations, the Parties to the 1955 Treaty could ever have believed that their Treaty constituted a boundary *de novo*. This discussion will lay the ground for Sir Ian Sinclair who will follow.

Now Sir Ian Sinclair will examine the 1955 Treaty in some detail, including the background to the Treaty, in particular the discussions within the United Nations, continuing into Tuesday. He

will be followed by Mr. Sohier who will review in detail the history of the various treaties which concerned this territory from 1890 through to the Treaty of Ouchy in 1912. And he will at the same time give the Court a picture of what the situation was, on the ground, both at the beginning and at the end of that period. Mr. Sohier's presentation will continue into Wednesday morning.

Professor Condorelli will follow him. Professor Condorelli will take the Court through the Treaty of Ouchy and the relations between Italy and both France and Great Britain between 1912 and 1915. He, too, will summarize the position on the ground as it changed during that period. Professor Cahier will then begin on Thursday morning, noting the few developments which occurred during the period of the First World War and then examining the period from 1919 to 1935. At that point Professor Condorelli will return to demonstrate how Italy saw the position up to 1935, as reflected in the Italian maps, and he will then go on to analyse the 1935 Agreement and finally to show that, even after 1935, the practice of both Italy and France confirmed that no boundary as yet existed. This remained so even at the time of the 1947 Peace Treaty.

Sir Ian will continue through the 1955 and 1956 Treaties between Libya and France, followed by Professor Cahier who will review the subsequent events principally in the context of relations between Libya and the newly-independent Chad. I will conclude Friday's presentations by suggesting how, in the light of the entire background, we must approach the interpretation of the Special Agreement and the task of the Court.

In the following week we shall turn to a new part of the argument. Having shown that there exists no conventional boundary, we will examine the non-treaty basis for the claims by both Libya and Chad.

Professor Crawford will begin on Monday by examining the nature of the territory and the legal principles relevant to the acquisition of title. I will analyse Chad's claim immediately after Professor Crawford.

Mr. Maghur will then begin the demonstration of the Libyan claim, building on the legal principles set out by Professor Crawford. He will describe the borderlands and their peoples and how, by the end of the 19th century, those peoples had accepted the Ottoman claim to sovereignty.

Mr. Kamel Maghur will be followed by Professor Dolzer on Tuesday, who will examine the situation from 1900 to the 1912 Treaty of Ouchy; and he will then make a comparison between the Ottoman and French claims. He will then by followed by Professor Condorelli who will first examine the title inherited by Italy, and then review the various factors now relevant to determining both title and the actual location of the boundary, after which I can conclude the first round of Libya's pleadings by showing how, with Libya's independence, the rights and title to this territory coalesced and were inherited by Libya.

Mr. President, we will provide the Members of the Court and our colleagues on the Chad team with a dossier of maps, to which we will add each day the additional maps relevant to the arguments for that day.

Mr. President, that concludes all I need to say at this stage. Perhaps after the coffee break you could call on Mr. Maghur to speak.

The PRESIDENT: Yes, thank you very much, Professor Bowett. We will take our ten minute break now.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. I now call upon Mr. Kamel Maghur.

Mr. MAGHUR: Thank you, Mr. President.

Mr. President, Members of the Court,

It is a very special honour to appear again before the Court on behalf of Libya. The last time I was so privileged was as Libya's Agent in the *Tunisia/Libya* case, some ten years ago.

As I look across today at the Court, I see only a few of the same faces. I should like to mention three of the Judges who are not sitting on the Court today. Judge Elias of Nigeria was presiding at that time. His passing was deeply felt by us. So also was the passing of Judge Singh, who I can still see following the oral argument of a case with lively interest. And only recently Judge Lachs has left us. It is difficult to put into words the feelings we have about that fine man: how much we admired and liked him and how much his presence is missed. This dispute between Libya and Chad now before the Court is the sort of case these Judges would have taken the greatest interest in. I should like to add how fine it is that Judge Herczegh has just been elected to the Court to fill the vacancy left by Judge Lachs and sits on the Court today to hear this case.

Mr. President, in my remarks today I shall start with a few comments about the way in which Libya approached the presentation of this case to the Court. Then I shall turn to two matters that Libya wishes to deal with right at the start. The first concerns the new materials produced by Chad after the closure of written proceedings. Ordinarily I would not take up this aspect of the conduct of Parties at this stage of our presentation, since I was planning to turn directly to other matters. However, Chad's late filing of these materials obliges me to address procedural and substantive aspects of this issue now; and I trust that the Court will bear with me if I have to go into some details in this respect. The second concerns the question whether the 1955 Treaty between Libya and France was itself constitutive of a boundary, as Chad maintains. The main legal analysis and discussion of the 1955 Treaty will be undertaken by Sir Ian Sinclair, who follows me. My purpose is to mention, as an introduction to the discussion of the 1955 Treaty, certain of the circumstances surrounding its negotiation. Finally, I shall conclude my remarks today with a short comment about Libya's conduct before the United Nations and the Organization of African Unity. Later on in this first round of oral argument Professor Cahier will return to the subject of the post-independence conduct of Libya and Chad.

Mr. President, turning then to Libya's approach to the preparation and presentation of its case: as Ambassador Obeidi has just mentioned, this case concerns a territorial dispute in circumstances where there has never been a conventional boundary in the region concerned. It is not

a case where Libya claims one line as a conventional boundary and Chad claims another line.

In a situation such as this, neither Party knows where the boundary lies, and the two Parties come to the Court to decide the question. Therefore, Libya has viewed its task to be to examine each aspect of the question, to study each agreement and document and each fact of relevance, and to present them to the Court. Libya did not begin its preparation of the case with the defence of a preconceived boundary in mind. It has not sifted through the evidence to uncover only the favourable facts.

Now, this effort has not been directed at preparing a lecture to be given the Court on the relevant principles and rules of international law. I have served long enough as a judge myself to appreciate the saying that "the Court knows the law". What Libya believes the Court requires is a complete understanding of the facts and circumstances to which the relevant principles and rules of international law may be applied in order to resolve the dispute.

Libya's three written pleadings have been directed in large part at such a task. Our purpose here at the oral hearing is not to repeat all this material. We are mindful of Article 60, paragraph 1, of the Rules of the Court, which requires that oral statements be "directed to the issues that still divide the parties" and that they shall not "go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain". One of Libya's prime objectives here at the oral hearing will be to point up the important elements of the case so that when the Court returns again to the written pleadings, the relevance of the many facts, documents and agreements will be more evident — some life will have been injected into them.

In this regard, Libya regrets that the issues dividing the Parties have not adequately been dealt with as yet. There are many issues that, up to now, Chad's pleadings have either totally ignored or have not bothered to face up to. Libya's Reply has cited some conspicuous examples of this failure. In municipal and international practice, a party who follows such a practice does so at his peril. In the course of these proceedings, Libya will bring out what these issues are. Libya invites the Court to reach the inevitable conclusion, if these issues are not adequately confronted by our distinguished adversaries.

Mr. President, I come now to my second subject today — the new materials submitted by Chad after the closure of the written pleadings in this case. These concerned, or were supposed to concern, the famous letter written by Chad's President Tombalbaye to Colonel Kadhafi in November 1972 recognizing Libya's sovereignty over what he called the "Aouzou Strip", a letter that Chad, not Libya, has placed into evidence.

I should like to remind the Court of the form and contents of this letter by referring the Court to a reproduction of the three-page letter placed in evidence by Chad as Annex 343 to Chad's Memorial, which will now appear on the screen behind me. It is not a very legible document and some writing seems to have been added to it. The first page has the Presidential letterhead at the top. The second page contains the key paragraph. At the bottom of the third page appears what purports to be President Tombalbaye's signature, which can hardly be made out. The Court will find in folder No. 5 a copy of the key paragraph and a more readable retyped text which I have placed on the screen behind me.

As the Agent of Libya has said, Libya does not doubt the authenticity of this letter, whose existence is supported by secondary evidence, but it has not been able to find the original letter. As a result, Libya did not produce the letter and did not discuss it in its first Memorial. To Libya, the letter's importance is that, at the very least, it reflected the unresolved status of the Libya/Chad borderlands at the time.

On 9 February 1993, the Deputy-Agent of Chad sent a letter to the Registrar of the Court. The letter stated that Chad, having noted that Libya's Reply had placed new emphasis on the Tombalbaye letter, had gathered what the letter described as the sworn testimony of *all the close associates* of the former President who were still alive 20 years afterwards and could be found in Chad. Enclosed with Chad's letter were the original copies of 11 documents purporting to be this sworn testimony gathered by the Court of Appeals in N'Djamena in October and November 1992.

On 21 March 1993, the Agent of Libya set forth his observations in a letter to the Registrar. The Libyan Agent's letter deals fully with the procedural aspects of this late submission of evidence by Chad under the Rules of the Court and explains why Libya decided not to object to the

production of these materials.

Before turning to a discussion of the form, nature and contents of this new material submitted by Chad, there is one point made in Ambassador Obeidi's letter that I wish to repeat. There was no new emphasis placed on the Tombalbaye letter in Libya's Reply that would justify the production of this material. This is apparent from a comparison between what is said about the letter in Libya's Counter-Memorial (paras. 5.118-5.134 and 8.76-8.77) and in Libya's Reply (paras. 11.13-11.32).

The reason I repeat this point is that I want to draw attention to the procedure followed here by Chad. The Tombalbaye letter is dated November 1972. Starting in 1978, the issue with which the letter dealt concerning title to the so-called "Aouzou strip" was placed in full public view by Chad. Rumours were already widespread about such a letter or commitment by Chad's President. Even after Libya furnished a copy of the letter to the OAU Subcommittee of Experts in 1987, Chad had had some five years to produce these new materials. But Chad waited until the last moment.

Why did Chad follow such a procedure, which is hardly in keeping with the spirit of the Court's Rules? Perhaps they were hoping to find an original copy of the letter or expecting that Libya might do so. After all, there is nothing very unusual about even major world Powers misplacing key documents. Whatever Chad's answer may be, Libya rejects the suggestion that new emphasis placed on the letter in Libya's Reply was a legitimate reason for this last-minute production of these materials.

Libya's position as to the Tombalbaye letter, as set out in both its Counter-Memorial and Reply, is simply that:

— It *confirms* that Chad believed in 1972 that the 1955 Treaty had not delimited Libya's boundary with Chad;

— It shows that Chad recognizes Libyan sovereignty over the territory referred to in the letter, and that there was no question at all of Chad's *ceding* territory to Libya in the letter;

— At the very least, it *established* that the question of delimiting the boundary between Libya and Chad remained to be resolved.

The question that comes to mind concerning this late submission by Chad is: *why all the*

fuss? Why does Chad feel it necessary to submit all this sworn testimony?

Of course, this is for Chad to explain. But one can hazard the guess that Chad has become increasingly concerned over the implications of the Tombalbaye letter *it* had placed in evidence, not Libya. Chad's advisers may also have, at the outset, reassured themselves that, even had the letter been sent, it concerned the *ceding* by Chad to Libya of territory, a power which Chad's President did not possess under Chad's Constitution. In other words, an *ultra vires* act. But, as pointed out in Libya's Counter-Memorial, the letter cannot be interpreted that way. There was no cession of territory involved at all. The letter is to be read as recognizing Libyan sovereignty over certain disputed territory. In both its Counter-Memorial (para. 5.12, fn. 19) and its Reply (para. 11.17), citing the *Nuclear Tests* cases and the *Legal Status of Eastern Greenland* case, Libya pointed out the legal significance under international law of such a formal declaration by a Head of State.

Thus, Chad must have had second thoughts over the wisdom of its having introduced the Tombalbaye letter into evidence. But there is another, even more important, point to be made. The new materials Chad has now produced deal with matters that go well beyond questions concerning the letter. They deal with alleged facts and events occurring in the years 1972, 1973 and 1974 that have never before been placed in evidence in this case. These events concern the alleged conduct of Libya and Chad during this period. So it would appear that what Chad is really concerned about — and why it produced these materials after reading Libya's Reply — is not what Libya said about the Tombalbaye letter, but what Libya's reply revealed concerned Chad's conduct during the 1970s, in *not protesting* Libya's presence in the borderlands for some five years after Chad was fully aware of the fact.

Mr. President, this new material submitted into evidence by Chad, independently of the Tombalbaye letter, confirms what Libya believed the Tombalbaye letter to have established: that at the very least, the question of delimiting the boundary between Libya and Chad remained to be resolved. It made clear that the 1955 Treaty had not settled the question of Libya's southern boundary. It demonstrated that, in the period 1972 to 1974 with which these materials are concerned, neither Libya nor Chad believed there was a conventional boundary between them, and

they both recognized the existence of a territorial dispute that had yet to be resolved.

Turning to the *nature and form* of this new material, it consists of 11 documents — described in Chad's letter as "sworn testimony" *("témoignages sous serment")* and in the documents themselves as *"Procès-verbal de déposition de témoin"*, or the "Verbatim Record of the Deposition of the Witness". However, it is apparent that those 11 documents have no greater value as evidence than would sworn affidavits. The documents are clearly not depositions in the sense of answers given to questions and cross-questions submitted by each side to the persons questioned. There is no indication of exactly what copy of the Tombalbaye letter was shown to each person. We are not told who prepared the questions put to them or whether they were shown the questions beforehand. There are indications that their replies may have been edited. We have no idea how many of such documents were discarded because the answers were considered unsatisfactory. So these documents have no more evidentiary weight than statements prepared by Chad's counsel and signed and sworn to by each person.

It is also clear that these materials cannot be regarded as submissions from which the Court is invited to pick and choose — a sort of buffet or *smorgasbord*, with none of the dishes necessarily recommended by the chef. To the contrary, just as in the case of allegations of Chad in its written pleadings or in evidence annexed to its pleadings, the various allegations made by these 11 persons must be taken to be assertions whose correctness Chad not only concedes but also endorses.

What is the composition of this group signing statements, whom Chad's letter describes as "all close assistants" *("tous les proches collaborateurs")* of former President Tombalbaye still alive and living in Chad?

If I were to take the Court through a detailed scrutiny of the group, and the general contents of each statement, a number of things would become apparent:

1. The persons could hardly be the only close associates of President Tombalbaye still available to give statements. In fact, over half of them appear not to have been close associates of the President at all.
2. Very few had any detailed knowledge of the operations of the President's secretariat, and

their comments on the letter are not reliable testimony.

3. Most of the persons appear to have been selected to answer questions on matters other than the letter, such as meetings held in 1972, 1973 and 1974.

4. Almost all these persons volunteered statements that had nothing to do with the areas of their experience or even with the letter itself — such as, for example, the 1971 speech of Chad's representative before the United Nations.

Rather than dwell on the make-up of this group of people, I shall turn to the contents of their responses to the questions put to them. Again, I regret having to deal with these details, but this is necessary to place Chad's late filing in proper perspective. I intend to demonstrate that this new material has made the question of the authenticity of the Tombalbaye letter entirely moot. For it established beyond doubt the very proposition that Libya would have based on the Tombalbaye letter, had the original one been found. That is — to repeat what I said a few minutes ago — that both Libya and Chad acknowledged that they had a territorial dispute to resolve and that no conventional boundary existed between them.

There are some eight subjects covered by these materials:

First, of course, is the authenticity of the letter. Here a number of aspects of the letter are commented on in the sworn statements:

(i) Whether the type used conformed to typewriters in the secretariat — let me pause a moment Mr. President — as if it was obligatory for the President, and President only, to use typewriters in the secretariat. Here the evidence seems to show the type was different. But several statements suggest that a close Syrian adviser of the President, Mr. El Zir, might have had the letter typed on typewriters other than those in the secretariat — presumably on instructions from the President. According to one statement, Mr. El Zir carried around with him Presidential letterhead, including pre-signed sheets of letterhead papers.

(ii) The letter's form and contents. Here the evidence seems rather manufactured. Persons, whose relationship to the President does not appear close, and with no knowledge of

secretariat procedure, express their purely personal opinion.

(iii) The use of the term in the letter, *"bande d'Aouzou"*. Here the line of questions is directed at establishing that the term was not in common use until 1975, and that no one close to President Tombalbaye heard him use this term during the period 1972 to 1974. Hence, the argument presumably goes, the President could not have written the letter for this term in the letter was not then used by him or anyone else. The answers to this question are conflicting, several persons believing the term *"bande d'Aouzou"* to have been in current use in 1973.

(iv) A fourth point about the letter, dealt with in questions put to this group, concerns President Tombalbaye's signature. With only a few exceptions, the witnesses say that they were not shown a sufficiently legible copy of the letter to determine the authenticity of the signature. Mr. President, if they were shown a copy no clearer than that put in evidence by Chad, this certainly appears to be correct, as the Members of the Court can verify from the copy in the Judges' folder. But what is striking, is that none of the witnesses explicitly *denies* that the signature is Mr. Tombalbaye's.

There also are questions put concerning the date when the President changed his first name *(prénom)* from François, which appears typed under the signature on the letter, to another name. The evidence given is that the change occurred after the date of the letter, so this line of questioning appears to fizzle out.

Chad does not state what conclusion it has reached concerning the authenticity of the letter based on this evidence. But there appears from the new evidence the distinct possibility that, on instructions, it was prepared by the President's close adviser, Mr. El Zir, for this new evidence also establishes that the President himself did not normally draft his own letters.

So much for the authenticity of the letter, Mr. President, the first subject addressed in these statements.

The *second* subject concerns the 1971 United Nations speech of Chad's representative. Professor Cahier will deal with this matter later on in Libya's presentation, so I need not go into this

further except to say that the official transcript of this speech refutes the allegations concerning it contained in these materials.

Third, several of the statements mention a governmental meeting in Chad on 28 November 1972, the same date as appears on the letter. They seem to establish that the letter was not mentioned at this meeting, which dealt with other subjects. It is not apparent why this fact casts doubt on the authenticity of the letter.

The *fourth* matter related to the situation at Aouzou during 1972 to 1974. Aouzou is referred to in the statements variously as a military post, an administrative post and a bivouac. Several statements allege facts that have never before been introduced into evidence.

One person asserts that, although President Tombalbaye never talked about the *"bande d'Aouzou"*, he often mentioned the post of Aouzou as occupied by the Libyans. So Chad admits that Libya's presence there was well known at the very top of Chad's Government around the time of the letter.

Another individual, who joined the Chadian Government in a position clearly bringing him into close contact with the President, alleges that in October 1973 he was put in charge of what he calls *"l'affaire du Poste d'Aouzou"*. He goes on to say that the *Préfet* of the so-called "BET", in his monthly reports of November and December 1973, reported on the presence of Libyan patrols at this post. This person also states that Libya had raised its flag over the post. He referred to it as a *"petit drapeau libyen"*. He says that he informed the President at once of these "excursions" and that the President charged him to look into the matter *("de voir cette affaire de très près")*. But no further investigation is reported by him until June 1974, when the President formed a delegation, which included this person, to go to Tripoli to discuss with the Libyan authorities *"cette affaire du Poste d'Aouzou"*. He reports on this meeting, described as warm and friendly.

Mr. President, this is the first time this June 1974 meeting has been mentioned in this case. Libya has not had time to assemble its own evidence concerning the allegations made here, so it can neither confirm nor deny them. However, let us see what Chad here alleges took place:

— The Libyans were asked if they wanted to install themselves at the Post of Aouzou. Allegedly

they replied, no — and that they had no claim over this zone *("cette zone")*. I will come back to this claim.

Well, of course, there is something wrong here. For this same person had just finished denying that at the time the region was referred to as the *"bande d'Aouzou"*. So what was this zone allegedly referred to by him?

— The Libyans, according to this report, went on to say that they were there because the people there were starving. It was a humanitarian mission on the part of Libya.

— Why then had you raised the Libyan flag over the fort? Oh, allegedly was the Libyan reply, it was a mistake of the military *who were patrolling the zone*.

— The Libyans allegedly suggested, to allay suspicions, that a joint administrative arrangement be put together so that any irregularities that might create trouble could be jointly discussed.

— Satisfied with the response and the good behaviour of the Libyans, the Chadian delegation left, saying they would pass this on to their President.

Mr. President, it is difficult to find consistency between what these statements say concerning President Tombalbaye's knowledge of the Libyan presence in the borderlands. One says that President Tombalbaye often mentioned the fort of Aouzou was occupied by the Libyans. Another states that President Tombalbaye, on various occasions, informed Chad's political party, which the President was the leader of, of the attempt of the Libyan authorities to justify their rights over a band of territory that included Aouzou. Yet this account of the June 1974 mission to Tripoli attempts to give the impression that Libya's presence in the region had just been discovered, conveniently overlooking the *Préfet*'s report of the year before concerning Libya's presence there.

Another statement also mentions a Libyan flag at Aouzou. It recalls that the weekly *Jeune Afrique* had reported a flag-raising ceremony at which the Chadian members of the Frolinat were present and went on to give a little of the recent history of the fort. It is said that during the French occupation there were about 60 camel-mounted troops stationed there, who were relieved at six-month intervals. After Chad's independence and the French military withdrawal, the troops stationed there fell to 30. Seeing this reduction in force, the Frolinat attacked and destroyed the fort.

No precise dates were given. After that, with the agreement of the Frolinat, Libya raised the Libyan flag in place of the flag of Chad. This is not just another miscellaneous detail — the present leadership of Chad is made up of former members of the Frolinat.

What can be made out of these various overlapping and, at times, conflicting allegations? First of all, it took Chad some six months to look into the situation reported by the *Préfet* of the BET. Obviously, it was not of particular concern. Then the Chadian delegation happily accepted Libya's assurances that their activities in the region of Aouzou were humanitarian not military. They were satisfied that Libya was not out to make trouble or to disturb the good relations recently restored between Libya and Chad. But it is evident that President Tombalbaye was well aware of Libya's presence in Aouzou and of Libya's claim to the region, for he frequently mentioned the situation to some of his colleagues, according to some of the statements.

Perhaps the most important point is that these statements confirm what Libya's Agent said in his opening remarks. Libya brought its governmental administration into this region because the peoples there were starving and they were regarded to be Libyan peoples. It was not a military move to try to assert rights in order to get the upper hand in future negotiations to settle which State had sovereignty over the area.

I turn now to the *fifth* subject addressed in these affidavits. Most persons were asked this question:

> "If the expression *'bande d'Aouzou'* was not employed at that time (that is in the period 1972-1973), how did President Tombalbaye designate 'the territory contested between Libya and Chad' *('le territoire contesté')*?"

It is the question itself put by Chad that is of interest. Putting such a question to these 11 persons is a clear admission by Chad that there was an unresolved *territorial* dispute. Not a *boundary* dispute, a *territorial* dispute. And not a dispute over something called the *"bande d'Aouzou"* — the "Aouzou Strip" — for Chad, in introducing these statements, describes the use of that term at that time.

Only two persons say there was no contested area. The answer of a third is of special interest. This person says that at the time it was the political extension of Libya, which went beyond

this zone of Tibesti, as he called it, that was Chad's concern. He goes on to say that there was under discussion with President Tombalbaye the possibility of creating a *zone tampon* (a buffer zone) between Libya and Chad to be called a "zone of friendship and solidarity", to be exploited economically by both countries and militarily occupied by the forces of both. He recounts some of the details of a working trip of President Tombalbaye to Tripoli on 10 November 1974. I shall return to his account of this meeting in a minute.

Mr. President, the *sixth* matter addressed was the December 1972 visit to Libya of President Tombalbaye. This event is dealt with rather briefly in the written pleadings. What Chad appears to be attempting to demonstrate is that there was no mention of the *"bande d'Aouzou"* during the visit.

One person, who accompanied President Tombalbaye on this trip, which culminated in the signing of the Treaty of 23 December 1972 between Libya and Chad, states that a joint communiqué was issued at the end of the visit and that it was silent about the territorial dispute. Chad does not furnish the document. In its Counter-Memorial (para. 5.124) Libya quotes from President Tombalbaye's speech at a banquet given in his honour at the time. The full text was annexed as CML, Exhibit 24. This speech included these remarks:

> "History tells us that before imperialism, which has ruled both our countries, there were close fraternal bonds. The current borders were created by imperialism ... We, the Libyans and Chad, consider any difference between us as the result of the geographic situation created by imperialism."

His words clearly reflected the fact that an unsettled territorial question remained to be resolved.

It is not surprising that the unresolved territorial question was not specifically mentioned in the communiqué allegedly issued (but not furnished by Chad), although this person does not say that such a question was not raised at the December 1972 meeting. For according to him the visit was devoted to broader questions and resulted in the formation of three committees: political, economic and security. This is confirmed in two other statements.

If the *"bande d'Aouzou"* was not a matter taken up at the December 1972 meeting, this hardly establishes that the Tombalbaye letter was not written. The opposite conclusion could be drawn, for the letter would have made it unnecessary to take up the subject at the meeting.

Since I am taking these matters up more or less chronologically, I turn next to the *seventh* on the list: the visit of Colonel Kadhafi to Chad in November 1972, reported on by two persons. According to one account, it was a simple protocol visit to lay the cornerstone of a clinic at N'Djaména. A conversation between President Tombalbaye and Colonel Kadhafi during that visit is reported during which the question of Libya's help in restraining the rebellion in the north was raised. Colonel Kadhafi allegedly responded that he could not stop fellow Muslims coming into Libya but he would not provide them with funds and arms.

This person expresses surprise that the question of Aouzou or of any other dispute failed to be discussed at the meeting. *Yes*, it *does* seem surprising. But not for the reasons this person apparently wished to convey. What is surprising is that President Tombalbaye and his associates at the meeting, fully aware of Libya's activities in the north of the borderlands at the time, had themselves not asked Colonel Kadhafi what they were doing there if they felt it to be a violation of Chad's sovereignty. The deliberate silence of President Tombalbaye is evidence that lends support to the existence of his letter of 28 November 1972.

I have already mentioned the allegations concerning a meeting between representatives of the two countries in Tripoli in June 1974 and the said allegations to discuss Libya's presence in Aouzou and the vicinity that was drawn to President Tombalbaye's attention by reports of the "*Préfet*" of what Chad calls the "BET" in November and December 1973.

So I turn next to the eighth, and last, subject addressed in the questions put by Chad to this group. This concerns President Tombalbaye's trip to Libya on 10 November 1974, with a delegation, and what allegedly transpired during his meeting with Colonel Kadhafi and his aides.

This is another meeting that comes up for the first time in this case. It is mentioned in the affidavit of a person who claims to have accompanied President Tombalbaye on the trip. This witness states that there was talk at that time of creating a jointly occupied, jointly developed "*zone tampon*" between Libya and Chad, a matter confirmed in another statement, as I have already mentioned.

Among the delegation, this witness reports, was another non-Chadian personal adviser to the

President, Mr. Abdel Aziz, a Mauritanian. The Court will recall that earlier I brought out the important role some witnesses felt a top Syrian adviser to President Tombalbaye, Mr. El Zir, may have played. Here, as in the case of the Syrian adviser, Chad furnishes no affidavit from the person.

This person — the person who made the statement — alleges that the question of creating a *zone tampon* was raised by President Tombalbaye during the meeting, which included Colonel Kadhafi, Major Jalloud, and others. His description of what ensued goes this way:

In response to the proposal, Colonel Kadhafi, turning to a map, asked the President to indicate where the zone would be.

President Tombalbaye replied that if the principle was accepted, it could be left to the experts to delimit the zone.

The conclusion drawn by this person from this alleged discussion — that it disproves the existence of the Tombalbaye letter — makes no sense at all: it has nothing to do with that. At the time, Libyan assistance to the peoples of the borderlands was not restricted to Aouzou or to any so-called Aouzou Strip. It extended throughout the region at least as far south as Faya and Fada at roughly 18° N latitude. The *zone tampon* might well have embraced much of this area as well, not just the so-called Aouzou Strip.

Another person reports on the meeting in Tripoli of 10 November 1974, although he apparently was not there. He claims that at the meeting the question of the distribution of Libyan identity cards in the "contested zone", as he expresses it, was raised both at the Committee level discussions at the plenary meeting. He quotes Colonel Kadhafi as saying that Libya already had a vast territory and had no need to annex the territory of friendly neighbours. What was involved, he said, was not the distribution of identity cards, but of food to the peoples of the region who were dying of famine — both Libyans and Chadians.

Mr. President, no official record of the meeting has been furnished by Chad or has been uncovered by Libya in preparing for this case, so this witness's choice of words in describing the conversation must be taken with a grain of salt. The fact is, Libyan identity cards were issued throughout much of the northern borderlands. Libya has examples of such cards. If the Court so

requests, Libya will produce those documents. Issuing these cards was an administrative measure linked to the distribution of food to the peoples of the area. Once again, the statements produced by Chad here emphasize the purpose of Libya's activities in this region: to save the starving population.

This same individual also reports a confidential discussion with President Tombalbaye in which the latter said he had made this proposal about a zone to trick Libya into implicitly recognizing that the contested zone, which this person identifies as the Aouzou strip, belonged to Chad. Allow me, Mr. President, to repeat this sentence of mine because I have to repeat it: he, speaking about the President, said the President said that he had made this proposal about a zone to trick Libya into implicitly recognizing that the contested zone, which this person identifies as the Aouzou strip, belonged to Chad. If this is true, first of all here is an example of the President using the term "Aouzou strip" before 1975.

Of course, this evidence is a clear admission by Chad that there was a territorial dispute to be resolved. And it brings out something else as well — that is why I repeated the sentence, Mr. President. Just as France in the 1955 negotiations avoided any attempt to deal directly with Libya over the unresolved question of Libya's boundaries east of Toummo, so did Chad in 1974. How history repeats itself.

To conclude this discussion of Chad's new, last-minute documentary submission, it is quite apparent that what really concerned Chad, and led to the last-minute production of these materials, is what Libya said in its Reply — not about the Tombalbaye letter, but about Chad's own conduct during the 1970s concerning the territorial dispute between Libya and Chad.

The fact that no protest was made by Chad against Libya's extension of governmental administration into the northern borderlands regions until almost five years after the fact, when there had been a political change in Chad, is a further indication that Chad knew at the time that sovereignty over this area remained at least to be resolved. If the original copy of this letter were found, it would reinforce this other evidence. But Chad's new submission, by itself, establishes the point, making moot the question of the authenticity of this letter.

This brings me to the end of the first matter that Libya wishes to dispose of right at the start

of its oral argument. Later on, when Professor Cahier considers the post-1960 conduct of Libya and Chad, he will return to the Tombalbaye letter and Chad's new submission in that context.

Mr. President, Members of the Court, I have taken enough of the Court's time discussing the matter of Chad's late filing. Now, I should like to turn to the main matter that I had planned to dispose of right at the start — the 1955 Treaty. What I have to say is introductory to the detailed legal treatment that Sir Ian Sinclair will give the subject after I finish.

Prior to the achieving of independence in 1951, Libya had been ravaged by war. There had been the war with the French in the borderlands, the war with the Italians further north, and, of course, World War II, in which the major North African battles on Libyan soil had taken their toll of the Libyan peoples, their lands and their possessions, primarily along the coastal region of Cyrenaica and Tripolitania.

Not only had Libya been ravaged by war, but it had been occupied by three military Powers, who were still there at the time of its independence on 24 December 1951 — France in the borderlands and Fezzan; Great Britain in Cyrenaica and Tripolitania; and the United States, which had built the Wheelus Air Force Base in Tripolitania and other bases elsewhere in Libya. And France had territorial aspirations to annex the borderlands and Fezzan to its African possessions and territories. In 1948, France advanced the proposal that would have greatly modified the conventional boundary France claimed to exist based on the two 1919 treaties. It would have appropriated to France huge areas along the Libyan frontier with Algeria and along its southern frontier. The other Powers, notably the Soviet Union, refused to accept the French proposal.

Aside from recovering from the shock of war and being occupied by three major Powers, Libya was one of the poorest States in the world in 1951. Its peoples were largely uneducated and untrained. It was not a good prospect to be granted independence as a State. At the United Nations, France, in particular, strongly opposed Libya's independence, feeling that it could not survive as an independent State. It was nothing short of a miracle that under the auspices of the United Nations, and with the notable assistance of the United States and the Soviet Union, Libya entered the family of nations in 1951, and somewhat later was admitted to the United Nations.

One of the events occurring at the time of Libya's independence was the adoption of a Constitution installing the Head of the Senoussi, King Idris, as Monarch and Chief of State of the United Kingdom of Libya. Article 4 of its Constitution referred to Libya's boundaries in such a way as to make it clear that there was no conventional boundary east of Toummo. This will be demonstrated by Sir Ian Sinclair. Libya achieved independence without a conventional southern boundary between Toummo and the Sudan border, and its Constitution reflected that fact.

The United Nations issued a map with the Study of the Secretariat in January 1950 regarding the delimitation of Libya's boundaries showing a line which was neither the 1919 Anglo-French Convention line claimed by France nor the 1935 Franco-Italian Treaty line. And this line was accompanied by question marks. Here, on the screen, is that map. It will be again discussed by Sir Ian Sinclair. The need for France and Libya to negotiate to delimit this boundary was then set out in General Assembly resolution 392 (V) in December 1950.

Thus, when Libya achieved independence in December 1951, three key elements were in accord that Libya had no conventional southern boundary: General Assembly resolution 392 (V); the United Nations map attached to the Secretariat's study of the boundary question; and Libya's Constitution. This essential fact — the absence of a southern conventional boundary — conditioned Libya's subsequent conduct concerning its boundaries.

Sir Ian Sinclair will analyse the events occurring at the United Nations leading to resolution 392 (V) as well as the negotiations leading to the 1955 Treaty between Libya and France. And he will examine in detail Article 3 of the 1955 Treaty, a provision that dealt specifically with the question of boundaries between Libya and the surrounding French territories. I shall limit myself here to saying something about Libya's attitude towards these negotiations at the time, its total lack of capability to deal then with boundary negotiations, and its intention not to do so.

When the negotiations that ultimately led to the 1955 Treaty started in January 1955, I would estimate there were not more than five lawyers in Libya. Only one lawyer, Mr. Fekini, fresh from law school in Tunisia, with no experience of any kind, was assigned to assist the Libyan team. When I graduated from law school in Cairo two years later, I would estimate that the number of

lawyers throughout all of Libya had increased to about 10. Like Mr. Fekini, I knew nothing about matters of international law and international boundaries when I graduated from law school.

Libya's Prime Minister, who led the Libyan negotiating team during the January and the July-August negotiations, had been born 34 years earlier in Alexandria and had lived and received his education in Egypt. He was neither a trained diplomat nor a lawyer; he was an engineer. Nine years out of the university, at the age of 34, he had been appointed both Libyan Prime Minister and Foreign Minister. The contrast between this young man conducting the 1955 Treaty for Libya and France's M. Mendès-France and, later, M. Dejean, a senior French diplomat formerly one of General de Gaulle's right-hand men, is striking.

If Libya's young Prime Minister's *curriculum vitae* was a little unusual to qualify him to conduct the negotiations, it is clear that he had one primary objective — to get the French to leave Fezzan as soon as possible. And he never let up until he thought he had achieved that goal with the signing of the 1955 Treaty. He also knew what he did not wish to deal with in the 1955 Treaty — namely, boundary questions. He was not equipped to do so.

But the French Government forced his hand in both matters. I wish to emphasize here a few of the points that emerge from the available Libyan *travaux*.

In the January phase of the negotiations, Libya's Prime Minister made clear that the French had to leave Fezzan — as quickly as possible. He agreed to a formula concerning the Franco-Libyan boundaries under which the parties were to abide by the general stipulations of the international treaties in force at the time of Libya's independence *("aux stipulations générales des textes en vigeur à la date de la création de l'Etat libyen")*.

But in February 1955, the French Government of M. Mendès-France fell, and there was considerable doubt for a time whether the French would resume negotiations. There was strong French sentiment not to evacuate Fezzan.

When negotiations did resume in July 1955, the French Government sent a high-powered team to Tripoli, led by M. Dejean, armed with a draft treaty and various alternative propositions. This particular part of the French *travaux* from the Quai d'Orsay archives has been put in evidence by

Libya but not by Chad.

The major sticking point in the July-August negotiations concerned reaching agreement over the French military role in Fezzan should hostilities break out in the region after their departure. This problem had contributed to the delay in resuming the negotiations after January so as to allow time for the British and French to reach a side agreement covering their respective roles in the event of the outbreak of hostilities.

The boundary question was a distinctly secondary matter during the second phase of the negotiations, except for the part of the Libya-Algeria frontier south of Gh
at in the direction of Toummo. There the French brought heavy pressure on Libya to agree to the rectification of this part of the line delimited in the Franco-Italian Accord of 12 September 1919. They succeeded in exacting an agreement on three points through which the boundary was to pass, which was incorporated into Annex I to the Treaty. But the Libya-Algeria boundary between Ghadamès and Ghat, delimited by the same 1919 Accord, was specifically recognized, and the French did not disclose at the time their aim to rectify this boundary so as to obtain for France the Edjélé oil field, whose prospects for high commercial production were well known by mid-1955.

When the 1955 Treaty was signed on 11 August 1955, Libya thought it had achieved its objective — to get the French out of Fezzan by the end of November 1956. They had postponed settling the boundary question, which Libya had repeatedly stated it was not prepared to discuss, except for the southern sector of the Algerian boundary. There Libya had agreed to a rectification of that boundary after quite a struggle, an examination of maps, and a field trip to the site by a joint Libyan-French team.

Libya proceeded promptly to ratify the Treaty. Not so the French! Not until less than a month before the date set for the French to evacuate Fezzan — that is, 30 November 1956 — did the French Government even present the 1955 Treaty to the French Parliament for ratification. Finally, as a condition of ratification, an additional price was exacted from Libya to avoid France's abrogation of its commitment to leave Fezzan. This additional price was to rectify, under a separate agreement, the Ghadamès-Ghat sector of Libya's boundary with Algeria in order to secure the Edjélé

oil field for France. At the end of 1955, the production of oil in important commercial quantities from the Edjélé field had been confirmed, and it was heralded as a major discovery.

Mr. President, there was no mention at all in the 1956 Treaty, which accomplished this boundary rectification, of Libya's southern frontier east of Toummo.

What, then, was the resulting situation as to the southern Libyan boundary after the 1955 Treaty had been signed and ratified and after the 1956 Treaty had been signed?

Clearly, Libya had not negotiated with France the delimitation of its southern boundary. The subject had not been dealt with. Libya and France had postponed doing so. So the situation remained as described in Article 4 of Libya's Constitution: no southern boundary. The furthest Libya had gone in Article 3 of the 1955 Treaty was to agree to accept a conventional boundary if it existed under international agreements in force on the date of its independence.

In the course of the 1956 negotiations forced on Libya — and this time Libya had a Swiss technical adviser to actually participate in the negotiations — the proposal to consider the entire Libyan frontier, including that between Toummo and the Sudan, was made by the Libyan side. The French flatly refused to consider regions south of Ghat in the discussions.

Shortly after the signing of the 1956 Agreement, disputes with France broke out along Libya's frontier with Algeria. There were a series of serious skirmishes between Libyan and French troops. The Algerian war, which had begun recently in 1954 and had increased in intensity, and Libya's open support of Algeria led to a further deterioration of Libya's relations with France. There was no prospect of negotiations resuming with France to delimit Libya's southern boundary, and neither Libya nor France made any effort to do so after 1956.

However, Libya took one important action four days after the signing of the 1955 Treaty. Libya issued an official map, without any disclaimer, on which was drawn a southern boundary . This map now appears on the screen. It was signed by Libya's Minister of Economy. This map, called map No. 1, was annexed to Libya's Petroleum Regulation No. 1 issued under its 1955 Petroleum Law. This Petroleum Law was the first set of rules issued by Libya to govern petroleum concessions granted to foreign companies. Map No. 1 was Libya's first official map.

As you can see on the screen, Mr. President and Members of the Court, map No. 1's southern boundary coincided almost exactly with how the United Nations maps then being issued portrayed a southern Libyan boundary, east of Toummo, as is shown on the screen, although in the case of the United Nations maps, always with a disclaimer. This line was neither the 1935 line nor the 1919 line claimed by France but rather the line shown with question marks on the map annexed to the Secretariat's 1950 Study.

When this map was issued, I was still a student. I do not know why this exact line was placed on map No. 1. But since then I have served as Libya's Minister of Petroleum and have come to know something about matters of this kind, at least from the Libyan standpoint.

On an official map of petroleum zones, boundary lines cannot be omitted — or left blank. The whole purpose of such a map is to instruct and guide foreign oil companies as to the limits of their concessions. If a boundary is not known, it is the practice — and a wise practice — to place such a line in a conservative way, usually with a disclaimer, and sometimes also indicating that there is an unresolved boundary question. This is done so as not inadvertently to lead an oil company into a possible boundary infringement incident.

The line chosen for this map by Libya made a good deal of sense. As you can see again on the screen, it conformed to neither the 1919 line nor the 1935 line.

Rather, it followed a line set out on United Nations maps at the time, which reflected the fact that Libya's southern boundary had not been delimited.

The French Ambassador to Tripoli at the time, M. Dumarçay, an experienced and astute diplomat, immediately protested the map. Libya did not respond officially to the French protest. But it did not change map No. 1. By its protest, France had officially proclaimed that it was aware that Libya and France were not in agreement as to a Libyan boundary line east of Toummo — a mere four days after signature of the 1955 Treaty. Yet France took no further action to attempt to delimit this boundary. At the same time, while failing to take any further action regarding Libya's southern frontier, and even rejecting Libya's proposal in 1956 to consider this frontier, France proceeded to force Libya to rectify the Libya-Algeria boundary between Ghadamès and Ghat as a

condition of ratifying the 1955 Treaty.

The contrast between France's conduct in respect to Libya's southern boundary and the western frontier is revealing. It certainly cannot be said that France refrained from proposing to proceed to delimit Libya's southern boundary, as called for by General Assembly resolution 392 (V), because it thought Libya had agreed that the matter was settled. Libya's map No. 1, which France officially protested, clearly showed that Libya and France were not in agreement over Libya's southern boundary four days after the signature of the 1955 Treaty.

When Chad achieved independence in 1960, all official United Nations maps then issued showed a line for Libya's southern boundary that was neither the 1919 line nor the 1935 line. Libya placed those maps in evidence in its Memorial. The line on those United Nations maps was virtually the same line as appeared on Libya's map No. 1. And the United Nations had made it clear that this line did not indicate a conventional boundary but rather marked a frontier where the boundary had not yet been delimited.

Mr. President, for the nomadic *Muslim* tribes of Libya and the borderlands the concept of political boundaries had historically been of little concern. So it is no surprise that boundaries were not the first order of business for Libya to deal with after its independence. As a new State struggling for survival, other matters necessarily came first. I was interested to note in the book written by the distinguished Agent of Chad, entitled *Tchad: l'Etat retrouvé* and published in 1987, that boundaries had the same sort of low priority for Chad, as well. The distinguished Agent of Chad said in his book on page 115, that Chad also was too preoccupied with other issues to be able to give the matter, i.e., the matter of boundary, any priority of attention.

When, in 1977, and thereafter, the Libyan-Chad territorial dispute entered the international political arena, it was as part of a larger, more serious political dispute in which Libya was falsely accused by Chad of intervening in its internal affairs. From time to time, the accusations became vitriolic, varying in intensity according to which group was in power.

It is important to note that the positions of Libya and Chad were entirely different. And this difference led to a different approach to their public handling of the dispute at the time.

Chad had decided to adopt — hook, line and sinker — the French thesis concerning Libya's southern boundary based on the 1919 Anglo-French Convention line. For Libya, the question had yet to be resolved — the delimitation negotiations called for in General Assembly resolution 392 (V) had yet to take place. Libya felt it inappropriate and unwise to attempt to try a legal case before a political forum, particularly when the items on the agenda to be debated concerned the broader, quite different matter of allegations of intervention by Libya in the internal affairs of Chad, allegations that were untrue.

If the position of a State is that a conventional boundary exists, it may feel compelled to assert its rights at every opportunity, whether appropriate or not. If, on the other hand, a State believes no such conventional boundary to exist, it has no obligation to lay out the basis of its claim in a political forum in advance of the negotiations yet to take place between the parties or, failing resolution, in anticipation of a judicial settlement. A lot of public posturing by Libya at the time would only have aggravated the difficulties between the two countries.

Mr. President, Members of the Court, I want to be completely frank about this. Libya had not given the matter of its southern boundary the kind of thorough legal analysis that such a question must have before a State can adopt and state publicly its official legal position. Libya did not then have the legal staff to conduct such a study. Libya does not today have such a capability without going outside of Libya, retaining legal experts and mounting a major legal experts and mounting a major legal project. With no prospect in sight in the 1960s, the 1970s and the 1980s of being able to sit down and negotiate with Chad the delimitation of this boundary, Libya had no reason — and certainly no legal obligation — to undertake such a project.

Chad's situation was entirely different. It adopted the French position that had been in the making since at least 1914. All Chad had to do was to piece together the already fully prepared, well-articulated French case. And as both the Agent and I have emphasized, Chad like France was attempting to defend a line that they maintained was a conventional boundary. For Libya, there was no conventional boundary unless it was the 1935 Treaty boundary, a matter into which they (Libya) had looked in a preliminary way.

To resume the story, Mr. President, there were a few random meetings between delegations of Libya and Chad in the late 1970s. They were doomed to failure in view of Chad's internal difficulties. Had an agreement been reached with one group in power in Chad or in parts of Chad, Libya realized it might soon be denounced by the next group coming to power or even subsequently by the same group if it stayed in power.

The situation before the OAU was essentially the same story as before the United Nations. It was a political — diplomatic forum, and the territorial dispute involved legal issues beyond the competence of the Organization of African Unity. When, finally, the OAU came to realize the futility of trying to reach a settlement of the dispute at the political level — and that it concerned complex legal questions — the OAU recommended that Libya and Chad take the dispute to international arbitration or to the International Court of Justice.

Thus, to summarize what I have said about Libya's conduct during the period since its independence, Libya favoured postponing the issue of delimiting its southern boundary in 1955 with the French because it was not prepared for these negotiations. The French Government carefully avoided tabling the issue at the negotiations for it was aware that the French thesis as to a southern boundary had certain fatal flaws. The French thought they could bluff their way through. Thereafter, relations deteriorated to the point that no such boundary negotiations were feasible. But France was on record — in the most official kind of way in the light of its protest to Libya's map No. 1, issued four days after the signature of the 1955 Treaty — (France was on record) that the territorial dispute concerning Libya's southern frontier had not been settled.

After Chad's independence in 1960, Chad was in no condition to negotiate such an agreement, and Libya realized the futility of trying to do so. Moreover, neither Libya nor Chad considered the matter to be one of top priority in the light of the many other problems facing these two newly independent States. Chad's new, last-minute submission confirms that both Libya and Chad recognized that the territorial dispute between them, inherited from colonial days, remained to be resolved.

When the territorial dispute was discussed before the Organization of African Unity and the United Nations, it was as part of more serious, politically charged issues. Libya regarded these

political forums to be inappropriate to deal with this kind of legal question. The United Nations had adopted the resolution in 1950 that it had no power to delimit boundaries; by General Assembly resolution 392 (V) the United Nations had referred the matter to Libya and France to resolve by negotiations. The Organization of African Unity, realizing the complexity of the legal questions, recommended that the matter be referred by Libya and Chad to the International Court of Justice.

But here today, Mr. President, in the case now before the Court, following the failure of efforts at the political-diplomatic level going back around 100 years, Libya has no reluctance to place the entire matter in the hands of the Court, without restriction. It appears to be *Chad* who hesitates to ask the Court to resolve this dispute with finality without imposing limits as to what the Court is competent to decide.

This brings me, Mr. President, to the end of my statement. And I would ask you now to call on Sir Ian Sinclair to return to a detailed discussion of the 1955 Treaty between Libya and France.

I thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Maghur. Sir Ian we have a problem, we were prepared to sit rather later than usual but I think you would prefer to begin afresh with a clean start tomorrow morning at 10 o'clock. Thank you very much.

The Court rose at 1.05 p.m.

CR 93/15

International Court
of Justice
THE HAGUE

Cour internationale
de Justice
LA HAYE

YEAR 1993

Public sitting

held on Tuesday 15 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mardi 15 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Presents:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent,

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Advisers and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Adviser and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Sir Ian Sinclair.

Sir Ian SINCLAIR: Mr. President, Members of the Court,

The second half of the statement made by Mr. Maghur yesterday was devoted to a brief account of Libya's views on the significance of the Franco/Libyan Treaty of 1955 to a resolution of the territorial dispute between Libya and Chad. Mr. Maghur rightly placed the 1955 Treaty in the context of the broad political relations between Libya and France in the early and mid-1950s. Now, the Court will be aware from the lengthy written pleadings that the first major element in Libya's case is that there is not now, nor has there ever been, a conventional boundary between Libya and Chad, or between the territories now comprised in Libya and Chad, whether on the basis of Article 3 of the 1955 Treaty read in isolation, or on the basis of any of the other international instrument not referred to in Annex I. That is the broad framework of this opening part of Libya's oral pleading. Within that broad framework, my particular task is to present Libya's considered views on the significance and meaning of Article 3 of the 1955 Treaty in the context of the present territorial dispute.

The Court will of course be familiar with the principle of "contemporaneity" in treaty interpretation. The late distinguished Judge Sir Gerald Fitzmaurice formulated this principle in the following terms:

> "the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded." (33 *BYBIL*, 1957, p. 212.)

That principle has been applied by the present Court, for example, in the *Rights of Nationals of the United States of America in Morocco* case (*I.C.J. Reports 1952*, p. 189).

Of course, as the Court will be aware, this principle of contemporaneity in treaty interpretation is not unqualified. We know from the Court's Judgment in the *Aegean Continental Shelf* case (*I.C.J. Reports 1978*, p. 32) and from its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*I.C.J. Reports 1971*, p. 31) that expressions may be used in a treaty which are, as it were, by definition, generic and which may lend

themselves to an evolutionary interpretation. However, subject to this qualification, the principle of contemporaneity, as an expression of the broader concept advanced by Max Huber in the *Island of Palmas* arbitration that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled" (2 *UNRIAA*, p. 845), certainly has its part to play in the process of interpretation.

Now, Mr. President, Libya has thought it right to begin this series of presentations by taking first the 1955 Treaty. This is because both Libya and Chad accept that this should be the starting point. Chad indeed asserts in its Memorial that the 1955 Treaty constitutes *un titre contestable* determining the international boundary between Libya and Chad (MC, Chap. III). Chad likewise insists in its Reply that the 1955 Treaty has an exceptional importance for the purpose of the settlement of the dispute submitted to the Court (RC, para. 5,56). True, Chad appears at time to resile from this position, particularly in its most recent pleading. Thus, Chad now appears to maintain that by the 1955 Treaty, France and Libya confirmed the line of the disputed boundary; but that, even if they had not concluded this Treaty, the line would still have been the same by reason of the fact that, at the time of Libya's and indeed Chad's independence, it resulted from previous agreements to which the two States had succeeded; and that, even if, in their turn, these previous agreements must be ignored, the Aozou strip would not be less Chadian because of the effectiveness of the French and Chad presence in that area (RC, para. 1.32). Now, the Court may think that this marks a substantial retreat from Chad's opening position that the 1955 Treaty constitutes *un titre incontestable* determining the boundary between Libya and Chad. At the very least, it seems to herald a certain distancing by Chad from the terms of the 1955 Treaty.

The Court will hardly need reminding that Chad has advanced three distinct theories to sustain its case that the boundary runs along what Chad refers to as the 1899/1919 line — that is to say, the south-east line described in Article 3 of the Anglo/French Additional Declaration of 1899 as "interpreted" by the final paragraph of the Anglo/French Convention of 8 September 1919. The *first* theory is that, by virtue of Article 3 of the 1955 Treaty, Libya and France agreed that the boundary between Libya and Chad should be the line already fixed by the international acts listed in Annex I,

and notably the two Anglo/French treaty instruments to which I have just referred; and this quite irrespective of the status of that line or the opposability of the international acts concerned to Libya. On this first theory, Article 3 is *constitutive* of the boundary between Libya and Chad east of Toummo. The *second* theory is that the south-east line described in Article 3 of the 1899 Declaration, while conceded by Chad to have divided only spheres of influence in 1899, had become a true boundary line as between Britain and France, and subsequently as between Italy and France, by reason of French occupation of territories up to the 1919 line in the period between 1913 and 1919, and of recognition of that line by both Great Britain and Italy. The *third* theory is that, irrespective of any treaties, precisely the same line had become a true boundary line by 1919 based on French *effectivités* alone. Now, it is, of course, a curious feature of the three theories that they all lead to an identical line.

I would stress that my task this morning is confined to addressing the first of these three theories advanced by Chad. Other of my colleagues will be reviewing the arguments of law and fact which are alleged to underpin or to support the other two theories, and will demonstrate how fragile — indeed how totally lacking in conviction — those arguments are.

By way of contrast to Chad's downgrading of the 1955 Treaty, Libya continues to insist on its central significance. Libya has not challenged, and does not challenge, the validity of the 1955 Treaty in general, or of Article 3 of that Treaty in particular. Libya has however drawn attention to certain instances of French conduct during the 1955 negotiations, which might be regarded as falling short of the standard of good faith applicable in such circumstances and which, in Libya's submission, must be taken into account in interpreting the combined effect of Article 3 and Annex I (CML, paras. 7.20 to 7.38). Libya is, of course, convinced that the ordinary meaning of Article 3 bears out fully the interpretation for which Libya contents — namely, that it did not *constitute* (or *determine*) a boundary in any sector of the line where no such boundary had been delimited pursuant to prior agreements and that it operated solely as a *recognition* by both Parties of those boundaries which had already been delimited as boundaries under such prior agreements. But, if any doubt remains on this aspect of the matter, Libya contends that this doubt must be resolved in

favour of the Libyan interpretation and against that of Chad, because of the proven evidence of French conduct during the 1955 negotiations. That conduct was of course designed, if not actively to mislead Libya over the legal basis of what France asserted was Libya's southern boundary east of Toummo, at least to prevent any substantive discussion of that portion of the alleged boundary. Now, Mr. President, Members of the Court, Libya accepts that "Article 3 of the 1955 Treaty is directly pertinent to resolving the present dispute" (RL, para. 5.04); and, indeed, Libya suggests that "The Court may well regard the 1955 Treaty as the logical starting point in its consideration of how to resolve the territorial dispute in this case" (RL, para. 5.01). Since both Libya and Chad (although the latter with some reservations) regard the 1955 Treaty as being of critical importance to the resolution of the present dispute, Libya will begin by analysing Article 3 of that Treaty.

Before doing so, a brief word is necessary about the immediate background to the 1955 Treaty. I will begin with the events of World War II, when Libya, then under Italian sovereignty, was the scene of major military operations. By mid-1943, with the defeat of Axis forces in North Africa, Allied forces were in military occupation of the whole of Libya. More precisely, British forces occupied Cyrenaica and Tripolitania while Free French forces, advancing from French Equatorial Africa, occupied the borderlands and the Fezzan. This was the position until the end of 1951 when Libya achieved its independence. But, with the end of World War II, discussions had already begun between the four major Allied Powers as to the future destiny of the Italian colonies in Africa, including Libya. These initial Four-Power discussions led to the incorporation in the Italian Peace Treaty of Article 23 and Annex XI, the latter being a Four-Power Declaration. Under Article 23, as you will hear further from Professor Condorelli later on, Italy renounced all right and title to the Italian territorial possessions in Africa, including Libya. These possessions were to remain under their present administration pending their final disposal. The Four Powers were jointly to decide upon the final disposal of the Italian colonies in Africa within one year from the date of entry into force of the Peace Treaty. The Four-Power Declaration specified that "the final disposal of the territories concerned and the appropriate adjustment of their boundaries" was to be made by the Four Powers "in the light of the wishes and welfare of the inhabitants and the interests of peace

and security, taking into consideration the views of other interested Governments". The Four-Power Declaration went on to stipulate that if the Four Powers were unable to agree upon the disposal of the former Italian colonies within one year from the entry into force of the Peace Treaty, the matter would be referred to the United Nations General Assembly for a recommendation, the Four Powers agreeing in advance to accept that recommendation.

The Court will have noted that what was reserved to the Four Powers was the right of *final disposal* of the Italian territorial possessions in Africa. The Peace Treaty did not transfer *sovereignty* over Libya and the other former Italian colonies in Africa to the Four Powers, either jointly or severally. With the entry into force of the Italian Peace Treaty, sovereignty over Libya remained in abeyance pending the decision to be taken on its final disposal either by the Four Powers jointly or, in default thereof within the specified time-limit, by the United Nations General Assembly.

Now, as the Court will be aware, the Four Powers were unable to reach agreement on the "final disposal" of Libya within the time-limit stipulated, so the question of Libya was duly referred to the United Nations General Assembly. It is interesting, however, that during the Four-Power discussions in 1948, France put forward a substantial claim for frontier revision. Mr. Maghur has already referred briefly to this French proposal. As the Court will see, it would have involved the placing of substantial areas to the east of Ghadames and Ghat within French territory, and straightening Libya's southern "boundary" in the Toummo and Tibesti areas so that it ran along the Tropic of Cancer as far as the 20th parallel of longitude. The Court will of course find this as Map No. 9 in the Judges' folders. And as the Court will see, this would have been all very much to the advantage of Tunisia, Algeria, French West Africa and French Equatorial Africa and to the clear disadvantage of Libya. All this is admitted by Chad in its Memorial (MC, para. 57). Perhaps fortunately, the Four Powers did not accept the French claim for frontier revision.

This abortive attempt on the part of France to secure substantial territorial gains for French possessions in Africa at the expense of Libya deserves particular mention, since it contrasts so vividly with what Chad asserts, both in its Application to the Court of 3 September 1990 and in its supplementary letter to the Court of 28 September 1990, to have been the true object and purpose of

Article 3 of the 1955 Treaty, namely to secure the explicit consecration of the *uti possidetis* of 1951 based upon previous specified agreements. There can be no doubt that the 1948 French proposal to the Four-Power to the Four-Power Commission, had it been accepted, would have ridden roughshod over any notion of *uti possidetis* and would have radically redrawn the boundary between Ghadames and Toummo delimited by the 1919 Franco/Italian Agreement.

It would not only have done that: it would have involved the further appropriation of substantial portions of Libyan territory in the south by drawing the boundary line between Libya, on the one hand, and the French possessions on the other hand, along the Tropic of Cancer as far as the 20th longitude. Certainly, it can hardly be maintained that France adhered to the *uti possidetis* principles in its approach to the boundaries of Libya in 1948. There is the further consideration that France was seeking to achieve this substantial revision of Libya's external boundaries through the medium of the activities of the Four-Power Commission. France was obviously seeking to achieve the imputation of Libyan territories, not through a process of negotiation in which account would have to be taken of Libyan interests, but under what one might term the euphemistic rubric of "boundary adjustments" which, by a strange quirk, always seemed to favour French interests.

It only remains to point out that the French military did not abandon the idea of securing a revision of what they conceived to be Libya's southern boundary in favour of French West Africa and French Equatorial Africa, notwithstanding the failure of the French Government to persuade the other members of the Four-Power Commission to accept France's proposal for frontier revision in 1948. In 1953, 1954 and 1955, the French military produced, for internal consideration in France, three different proposals for Libya's southern boundary, all of which shared a common theme. East of Toummo there would be a triangular piece of territory to the north of the 1919 line which would be attributed to French West Africa and French Equatorial Africa, so as to encompass the entirety of the Tibesti massif in French territory: in return, the south-east line from the 20th longitude eastwards should be drawn parallel to, but south of the 1919 line intersecting the 24th longitude at about 19° N rather than 19°30' N, thus affording some compensation to Libya.

When the Franco/Libyan negotiations were resumed in July/August 1955, the French

negotiating delegation was in fact authorized to make the proposal now being shown on the screen if it felt it could do so without raising the fundamental question as to the validity of the French thesis concerning Libya's southern boundary (RL, Supp. Ann. No. 6.6, Doc. No. 5); but, perhaps wisely, the French delegation did not believe this condition could be met, so that the proposal was never formally tabled.

Now, Mr. President, I do not fortunately need to go into detail at this stage about the handling of the Libyan question in the United Nations General Assembly in 1949 and 1950, but will do so in a later intervention. Suffice it to say that the General Assembly, by a large majority, recommended in Section A of resolution 289 (IV) of 21 November 1949, that Libya be constituted an independent and sovereign State; that this independence should become effective as soon as possible and, in any case, not later than 1 January 1952; and that a constitution for Libya should be determined by representatives of the inhabitants of Cyrenaica, Tripolitania and the Fezzan meeting and consulting together in a National Assembly. Section C of the same resolution dealt specifically with the boundaries of the former Italian colonies and called upon the Interim Committee of the General Assembly "to study the procedure to be adopted to delimit the boundaries of the former colonies in so far as they are not already fixed by international agreement", and to report with conclusions to the fifth regular session of the General Assembly.

The Interim Committee commissioned a study of this question from the United Nations Secretariat. The Secretariat study which was submitted to the Interim Committee on 27 January 1950, reflected the uncertainty which existed at the time as to whether Libya's southern boundary east of Toummo had been delimited by the international agreement, and if so by what agreement. France had contributed to that uncertainty by supplying inaccurate information to the Four-Power Commission. For example, France had asserted, *inter alia*, that the line shown on a map produced by the *Gouvernement-général de l'Algérie* was based on a (non-existent) Franco/Italian Protocol of 10 March 1924. It is therefore hardly surprising that the Secretariat study, while reproducing these French explanations, annexed a "Sketch-Map of Libya's Frontiers" showing a dashed line east of Toummo with three questionmarks superimposed on it — this you will

find, gentlemen, as map No. 6 in the Judges' folders. Mr. Maghur has already shown you the sketch-map. It will be seen that the dashed line with question marks shown on this sketch-map was not the east-south-east line resulting from the Anglo-French Convention of 8 September 1919; it was in fact closer to, but not identical with, the 1935 Treaty line, as you will see on the screen. This clearly indicated the doubt that existed that the time as to whether, and if so to what extent, Libya's southern boundary had already been delimited by international agreement.

During subsequent discussions in the Interim Committee and the *Ad Hoc* Political Committee, the majority view was clearly that the General Assembly had no competence to rectify or adjust already existing boundaries, and that a clear distinction must be drawn between the concepts of delimitation, demarcation and rectification of a boundary.

In the light of these discussions, the United States delegation presented a draft resolution initially to the Interim Committee and subsequently in a slightly modified form to the *Ad Hoc* Political Committee. This draft resolution later became General Assembly resolution 392 (V) of 15 December 1950, which provided *inter alia* (and this is the most significant portion of the resolution):

> "That the portion of its boundary [this is Libya's boundary] with French territory not already delimited by international agreement be delimited, upon Libya's achievement of independence, by negotiation between the Libyan and French Governments, assisted on the request of either party by a third person to be selected by them or, failing their agreement, to be appointed by the Secretary-General."

In introducing this draft resolution, the United States delegate specifically argued: "that boundaries which had not yet been delimited should be delimited by negotiations between the States concerned". And she went on to emphasize: "that the contemplated procedure was applicable only to the delimitation of the boundaries and not to their rectification".

So it was quit clear that the resolution was to apply only to the delimitation of boundaries which had not yet been delimited.

Prior to the vote on this resolution, the French representative in the *Ad Hoc* Political Committee had intervened to explain the French position. He first of all presented a claim for *rectification* of the boundary between Libya and Algeria in the region of Ghat and Serdeles, making

it quite clear that this was indeed a question of boundary rectification. He then attempted to clarify France's position as regards Libya's alleged southern boundary east of Toummo. He first of all correctly pointed out that the 1935 Treaty of Rome between France and Italy had not been ratified, and then asserted, much more controversially, that, in these circumstances, reference should be made to "previous provisions fixing that section of the boundary". In this context, he cited the Franco/Italian Accord of 1902, with its reference to the boundary of Tripolitania "indicated in the map annexed to the Additional Statement of 21 March 1899", and the Anglo/French Convention of 8 September 1919, together with the Anglo/French Declaration of 21 January 1924, relating to the Anglo/French Protocol of 10 January 1924. Already, we can note the false reference to the map supposedly annexed (but in fact not annexed) to the 1899 Additional Declaration. He concluded by asserting that "the matter was therefore governed at present by all the texts he had just quoted". If this statement was intended to assert Libya's boundary with French West Africa and French Equatorial Africa was already *delimited* by international agreement, it is inconceivable that France should thereafter have voted in favour of resolution 392 (V), as France in fact did, both in Committee and in Plenary. It is inconceivable because, apart from Libya's southern boundary east of Toummo, there was no other portion of Libya's boundary with French territory which had not already been delimited by international agreement. Libya's boundary with Tunisia had been delimited by the Franco/Ottoman Convention of 19 May 1910, and the Secretariat study had duly noted this, adding that no claims or questions had been raised with regard to it. Libya's boundary with Algeria had likewise been delimited by virtue of the Franco/Italian Agreement of 12 September 1919 (as noted in the Secretariat study), and, although France had indeed presented to the United Nations a territorial claim in respect of the region of Ghat and Serdeles, this was a claim for *rectification* of the boundary (as the French representative himself admitted) and, for this reason, fell outside the scope of General Assembly resolution 392 (V). Accordingly, the only portion of Libya's boundary with French territory to which the resolution could apply as being "not already delimited by international agreement" was the boundary with French West Africa and French Equatorial Africa east of Toummo and running to the Sudan boundary. Chad has never sought to

give a meaning to General Assembly resolution 392 (V) other than the one I have just given. The latest Chad explanation, given in its Reply, is that the resolution refrains from specifying to what extent the boundary between Libya and French possessions in Africa is delimited or not. But the weakness of this explanation is manifest. The General Assembly proceeded on the assumption that there *was* a portion of Libya's boundary with French territory which had not already been delimited by international agreement. What portion could that be other than the southern boundary between Toummo and the Sudan border? Chad is careful not to respond to this crucial question.

One other event in the period preceding Libya's achievement of independence must be noted. On 7 October 1951, there was promulgated the Constitution of the United Kingdom of Libya. It has already been referred to briefly by Mr. Maghur. This had been drawn up with great care. Article 4 of the Constitution deals specifically with Libya's boundaries. What is highly significant — and I must mention that this appears as Item No. 11 in your Judges' folders — is that to the east, Libya admits that its boundary coincides with the "boundaries" of the Kingdom of Egypt and of the Anglo-Egyptian Sudan; and to the west, Libya admits that its boundary coincides with the "boundaries" of Tunisia and Algeria. But, to the south, the word "boundaries" is significantly omitted. Now this reflects the same conclusion as had been adopted in General Assembly resolution 392 (V), of the previous year and illustrated on the "Sketch-Map of Libya's Frontiers" annexed to the United Nations Secretariat study: the undetermined nature of Libya's southern boundary.

So much, at this stage, for the general background to the provisions of the 1955 Treaty relating to Libya's boundaries. The more immediate background was Libya's desire to achieve the removal of French military forces from the Fezzan. French forces had remained in the Fezzan since Libya had achieved independence under a temporary agreement which had to be renewed every six months. It was in fact renewed seven times. But in November 1954, the Libyan Government made it clear that it did not intend to renew this temporary agreement. Libya was prepared to enter into negotiations with France, but only on the basis that the negotiations would have as their point of departure the evacuation of French forces from the Fezzan. France's relations with the Arab world generally were strained at this time, primarily as a result of general Arab support, within the

framework of the anti-colonialist movement, for nationalist opinion in Tunisia, Morocco and Algeria. France was also at this time disenchanted with British and United States policy towards Libya. Both these States had achieved satisfactory agreements with Libya for the maintenance of their military facilities in Libya, and France looked to them for a degree of support in their negotiations with Libya which, in French eyes, was not forthcoming. It was in these difficult circumstances that France, with considerable reluctance, embarked on negotiations with Libya at the end of 1954, the negotiations being directed towards the conclusion of a Treaty of Amity. In these negotiations, and in return for their agreement to evacuate French forces from the Fezzan, France sought compensation with respect to security and frontiers.

Mr. President, I have spent a good deal of time in describing the general background and the immediate background to the opening of the negotiations between France and Libya at the end of 1954 which led to the conclusion of the 1955 Treaty, with its related conventions and other instruments. But the main purpose of the statement which I am making this morning is to address the question of the interpretation of Article 3 in the light of Chad's first thesis, namely that the 1955 Treaty itself *accomplished* the delimitation of Libya's southern boundary east of Toummo by a kind of *renvoi* to the *actes internationaux* listed in Annex I.

In other words, as I have said already, Chad's first thesis is that Article 3 was constitutive of Libya's southern boundary with French West Africa and French Equatorial Africa. By way of sharp contrast, Libya contends that Article 3 of the 1955 Treaty, read with Annex I, is not constitutive of any boundary, but is merely declaratory of the boundary status quo as of the date of Libya's independence, and is thus an affirmation of the strict *uti possidetis juris* principle as of that date. Does the text of Article 3 of the 1955 Treaty shed any light on the force of these respective contentions? Chad appears to assume that the wording of Article 3 fully supports her first thesis. For Chad, the 1955 Treaty constitutes *un titre incontestable* (MC, Chap. III, p. 94, para. 1) determining the international boundary between Libya and Chad. For Chad, and again I am quoting, this time from the Chad Counter-Memorial, a simple reading of the provisions of Article 3 and Annex I is sufficient to resolve definitively the boundary dispute (CMC, Chap. XI, p. 481,

para. 11.12). Chad asserts, and here I am citing from their Reply, that it only wishes to give to the terms of Article 3 of the 1955 Treaty their natural and ordinary meaning in the context of the Treaty as a whole (RC, Chap. V, p. 125, para. 5.34).

Now, I have to say that Libya takes issue with Chad on each of these propositions. Libya relies likewise on the literal interpretation of Article 3, but reaches conclusions diametrically opposed to those of Chad. So what does Article 3 say? And here we have the text. It is item No. 12 in your folders. It says in English translation that France and Libya recognize that the boundaries separating the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa, on the one hand, from the territory of Libya, on the other hand, are those boundaries which result from international acts in force on the date of the constitution of the United Kingdom of Libya, as listed in Annex I. So Article 3 does not delimit any boundary at all. It is directed towards the recognition by the parties of boundaries already fixed and delimited before the date of Libya's independence. And there clearly were such boundaries. Neither Libya nor Chad dispute that the boundary between Tunisia and Libya was originally delimited by virtue of the Franco/Ottoman Convention of 12 May 1910. Neither Libya nor Chad dispute that the boundary between Libya and Algeria was initially fixed by virtue of the Franco/Italian Agreement of 12 September 1919, although the boundary line so fixed was subsequently rectified in relation to the sector between Ghat and Toummo as a result of the inclusion in Annex I of the 1955 Treaty of a provision identifying three specific points through which the boundary line should pass; and that boundary line was rectified yet again as a result of the Exchange of Letters between France and Libya of 26 December 1956, to which I will have occasion to refer in more detail shortly. The Court will have noted that both the Franco/Ottoman Convention of 1910 and the Franco/Italian Agreement of 1919 are listed on the Annex I list. I would in addition stress the significance of the phrase *sont celles qui* which appears in Article 3. The Arabic and French language texts of the 1955 Treaty are equally authentic. In the Arabic text of Article 3, the words corresponding to *les frontières* are repeated instead of using the word *celles*, so that the equivalent in French would read: "reconnaissent que les frontières séparant les territoires . . . sont *les frontières* qui résultent . . ."

The Court will have noted that one of the few points on which both Libya and Chad appear to be in agreement concerns the critical date. Both parties accept that the critical date in this case, so far as Libya is concerned, is the date of Libya's independence, that is to say 24 December 1951; and, so far as Chad is concerned, the date of Chad's independence, that is to say, 11 August 1960. But it is in fact the date of Libya's independence which is the most significant date, and Chad itself seems to accept this when she states in her Memorial:

> "Lorsque la Libye devint un Etat indépendant, elle le fut dans le cadre de ses frontières telles qu'elles existaient au moment de son accession à l'indépendance, le 24 décembre 1951." (MC, pp. 88-89, para. 138.)

The notion of a "critical date" is, generally speaking, that it is the date on which a dispute may be said to have "crystallized", so that a court has to look at the evidence of title as it existed on that date. Evidence as to claims or conduct after the critical date is certainly not excluded, but in principle is treated as serving only to clarify or confirm what the situation was on the critical date.

The concept of the "critical date" has a respectable pedigree. Its genesis is usually found in the *Island of Palmas* Award. There was much discussion of the concept by counsel for both parties in the *Minquiers and Ecrehos* case, although, in the event the Court did not find it all that relevant in the particular circumstances. On occasion, tribunals have relied more on a "critical period" than on a precise "critical date", as in the Award in the *Taba* arbitration of 1988 (80 ILR, p. 226).

The "critical date" is particularly relevant in situations such as the present one, where a new State, or more than one new State, comes into being. This is because of the principle of *uti possidetis juris*, according to which a new State succeeds to, or inherits, the territory and the boundaries existing at the date of independence. The Court will recall that it made this very point with great clarity in its Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*:

> "By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession . . . the principle of *uti possidetis* applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the 'photograph' of the territorial situation there existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock . . ." (*I.C.J. Reports 1986*, p. 568, para. 30.)

So, in the present case, we must take our photograph of the legal situation as of 24 December 1951 — the date of Libya's independence. What happened thereafter cannot modify the situation unless there has been some new cession of territory which neither side alleges in relation to the border area east of Toummo. Conduct by either Party subsequent to 24 December 1951 is of course admissible, but only to prove, or disprove, the situation as it existed on that date.

It is of course Libya's contention that the only rectifications made to Libya's boundaries by the 1955 Treaty, and indeed by the subsequent 1956 Exchange of Letters, were modifications of her boundary with Algeria and that, in all other respects, the 1955 Treaty simply confirmed the boundary status quo — that is to say, as between Libya and what was later to become Chad, the absence of a conventional boundary.

But Chad has argued that the Libyan interpretation of Article 3 implies that that Article can be interpreted as not regulating any boundary question (CMC, Chap. XI, p. 486, para. 11.23). This, I may say, Mr. President, is demonstrably false. Article 3, read with Annex I, was designed to ensure the recognition by *both* Parties of any pre-existing boundary which might result from the international acts listed in Annex I. This was important not only to Libya but also to France, since Libya was the first State bordering French territory and French possessions in Africa to achieve independence in the post-war era. There was uncertainly in the 1950s as to what would be the position of newly independent States in Africa with reference to boundaries which the colonial powers had fixed as between themselves prior to the achievement of independence. The Court will recall that it was not until 1964 that the African Heads of State and Government approved the text of the Cairo Declaration. So there was definite advantage to France in ensuring that Libya would no longer be entitled to contest those boundaries which the Colonial Powers had already fixed conventionally as between themselves prior to the critical date.

It will of course now be evident to the Court that Libya and Chad are in fundamental disagreement as to the meaning which must be attributed to Article 3 of the 1955 Treaty. Both invoke the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, and, in particular, both rely upon the rule stated in paragraph 1 of that Article, namely:

"A treaty shall be interpreted in good faith in accordance with the ordinary

> meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Yet the Parties reach diametrically opposed conclusions as to the meaning to be attributed to Article 3 of the 1955 Treaty, read in conjunction with Annex I. Chad's first theory is that the ordinary meaning of Article 3 supports the conclusion that this Article *achieves* the *delimitation* of the boundary easy of Toummo by way of a *renvoi* to the international acts listed in Annex I. Libya firmly denies this, pointing out that the text of Article 3 goes no further than to confirm that those *boundaries* which result from international acts in force as of the date of Libya's independence shall be taken nas the boundaries between Libya and French possessions and territories bordering Libya. Now, I would reserve the right at this stage to revert late in this statement to any arguments which might be derived from the "context" of the 1955 Treaty. I would also reserve the right at that point to offer a few observations on the "object and purpose" of the 1955 Treaty. But it is already sufficiently apparent that the views of the Parties on the interpretation of Article 3 of the 1955 Treaty are so divided that recourse may usefully be had to the supplementary means of interpretation for which Article 32 of the Vienna Convention on the Law of Treaties makes provision. The Court will of course recall the terms of Article 32 of that Convention:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> *(a)* leaves the meaning ambiguous or obscure; or
>
> *(b)* leads to a result which is manifestly absurd or unreasonable."

Mr. President, I must say at once that Libya does *not*, and I repeat *not*, take the position that, in the present case, recourse to supplementary means of interpretation is necessary to *determine* the meaning of Article 3 of the 1955 Treaty. Libya firmly believes that the interpretation which it upholds is fully in accordance with Article 31 of that Convention and neither leaves the meaning ambiguous or obscure nor leads to a result which is manifestly absurd or unreasonable. But Libya *does* take the position that, in this case, recourse to supplementary means of interpretation will amply *confirm* the interpretation which Libya puts on the text. I have already, I must admit,

Mr. President, anticipated making reference to supplementary means of interpretation by analysing at some length the circumstances of the conclusion of the 1955 Treaty. Indeed, Libya regards the circumstances of the conclusion of the 1955 Treaty as being of prime importance in the present case, bearing in mind the need for the Court to bear constantly in mind the historical background against which the Treaty was negotiated. As one distinguished commentator has observed when commenting on the circumstances of conclusion of a treaty:

> "Il s'agit du cadre historique que forme l'ensemble des événements qui ont porté les parties à conclure le traité pour maintenir ou confirmer le *statu quo*, ou apporter un changement qu'une nouvelle conjoncture nécessite." (Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités," *RCADI* (1976-III), Vol. 151, p. 90.)

But at this point, it may be helpful if I were to analyse such *travaux préparatoires* of the 1955 Treaty as the Parties have been able to lay before the Court in their written pleadings to see what light they shed on the differing interpretations upheld by Libya and Chad.

The first point to note about these *travaux* is that they may be incomplete, at least with respect to the second phase of the negotiations in July and August 1955. I will have occasion to draw attention at a later stage to certain notable gaps in the archives of the French Ministry of Foreign Affairs. For its part, Chad has complained about the virtual absence of Libyan records of the negotiations immediately preceding signature of the 1955 Treaty, and has in particular accused Libya of failing to provide to the Registry copies of the complete documents of the Libyan records of which it provided extracts at Annexes 73 and 74 to the Libyan Memorial (RC, pp. 118-119, paras. 5.12 to 5.15). It should be said straightaway that Libya has nothing to hide. It was explained in paragraph 5.459 of the Libyan Memorial that the limited Libyan records relating to the second phase of the negotiations consisted primarily of unsigned minutes. This is not altogether surprising, given that the negotiations were taking place in Tripoli and that, as a newly-independent State, Libya was suffering from a shortage of trained personnel. In deference to the Chad complaint, however, Libya has furnished to the Registrar of the Court, under cover of a letter from the Libyan Agent of 4 December last, the complete texts of the records of which it furnished extracts at Annexes 73 and 74 to its Memorial. And it will be seen that the additional materials so furnished do not directly

concern the boundary problem, the extracts having included all material strictly relevant to the boundary.

The second point to note (and it is much more significant than the first) is that the *travaux*, and particularly the more recent *travaux* from French sources furnished by Chad, confirm that the French delegation to the second phase of the negotiations were under instructions not to enter into substantive discussions with the Libyan delegation about the boundary east of Toummo. We know already that, on 2 May 1955, the Governor-General of the AEF had written to the Ministre de la France d'Outre-Mer warning the French authorities of the risk the French negotiators would be running if the question of the southern boundary were opened up for discussion. More specifically, after setting out the long-standing French thesis as to the legal basis for this boundary (which, of course, the French Government of the day had temporarily discarded in 1935, as you will presently hear), he argued:

> "To request Libya to recognise the actual boundaries would risk implying that we retain doubts as to the strength of our rights and would put us more or less in the position of supplicants and expose us to a refusal which would give an appearance of a legal basis to possible claims by Tripoli." (ML, French Archives Annex, p. 169.)

In his view, the question of the delimitation of the southern boundary between Libya and the AEF should only be raised in the agreements to pose the principle of what he described as "a delimitation on the ground" to be undertaken in the future, taking as the *sole* basis the treaties in force as of the date of the creation of the Libyan State (ML, pp. 370-372, paras. 5.437-5.439). The long-standing French thesis was of course that Libya's southern boundary had been determined by the 1899 Anglo/French Additional Declaration as modified by the Anglo/French Convention of 1919, Italy having formally recognized, according to that thesis, the 1899 Additional Declaration by virtue of the 1900 and 1902 Franco/Italian Accords. Thus, the French position at this time was based exclusively upon the predicated existence of a *conventional* boundary deriving from these international acts, allowing absolutely no room for extraneous factors such, for example, as colonial *effectivités*. But the strong advice of the Governor-General of the AEF was not to get into any discussion about the legal basis of Libya's southern boundary beyond providing in the Treaty for a delimitation on the ground in the future, to be undertaken on the basis of treaties in force as of the

date of Libya's independence. Chad has sought to downplay the significance of this advice by describing the Governor-General as *un fonctionnaire français* and by describing his letter as *un instrument somme toute mineur* (CMC, p. 530, para. 11.130). But this is thoroughly misleading. The Governor-General was a senior and highly respected official, whose knowledge of the boundary problem as it affected French Equatorial Africa was second to none. Moreover, evidence from French archives confirms that his advice was strictly followed during these negotiations; and indeed the instructions given to the French negotiators when negotiations were resumed in July 1955, were entirely in line with the tactical advice which he had urged upon the French Government (RL, paras. 5.91-5.95 and Supp. Ann. No. 6.6).

By way of illustration of this point, I would draw the Court's attention to Exhibit 6.6 to the Libyan Reply, which is commented upon at Supplementary Annex No. 6.6 to the Libyan Reply. Point 1 of this particular Supplementary Annex discusses various documents prepared in Paris and brought to Tripoli by M. Dejean on the resumption of the negotiations in July 1955. The Court will recall that, during the first round of negotiations between France and Libya in January 1955, a certain amount of progress had been made on the boundary problem. In particular, it would seem that both delegations were prepared to accept a general formula for the text of Article 3 in the following terms:

> "Les deux gouvernements conviennent de s'en tenir, en ce qui concerne le tracé des frontières séparant les territoires français et libyen, aux stipulations générales des textes internationaux en vigueur à la date de la création de l'Etat libyen." (RL, Ex. 6.4.)

This text was duly conveyed to the British Foreign Office by the French Embassy in London on 10 May 1955 as an element of agreement achieved during the January negotiations (ML, p. 374, para. 5.445). Now, the first of the documents brought to Tripoli by Mr. Dejean on the resumption of negotiations in July 1955, is a variant of the formula already agreed in January for what was to become Article 3 of the Treaty. It would appear from Annex 102 to the Chad Reply that this draft was tabled on that date:

> "Les deux Hautes Parties Contractantes reconnaissent que les frontières séparant le territoire de la Libye d'une part, des territoires de la Tunisie, de l'Algérie, de l'AOF et de l'AEF, d'autre part sont celles qui résultent des actes internationaux en vigueur à la date de la constitution du Royaume-Uni de Libye."

It may be surmised that this new text was thought to be more suitable for incorporation in the eventual Treaty than the formula agreed in January, having regard to the possible imprecision of such terms as *stipulations générales*. No change of substance, however, seems to have been intended. To assist the Court, I now show the agreed January formula and the alternative text of Article 3 tabled by Mr. Dejean on 19 July.

It will also be seen that this new text is virtually identical with the text of Article 3 as finally adopted, with the significant omission of the reference to the list of *actes internationaux* in Annex I. But among the documents brought to Tripoli by Mr. Dejean was an alternative version which would have completed this text of Article 3 by adding an extra sentence: "Ces frontières figurent sur la carte jointe en annexe au présent traité." This alternative version would also have embodied another paragraph in the following terms:

> "La délimitation, sur le terrain, de la frontière entre Ghat et Toummo sera effectuée, d'accord entre les Hautes Parties Contractantes, dans un délai de [left blank] à dater de la mise en vigueur du présent traité."

The same set of documents also contains proposed language obviously designed to complete this additional paragraph:

> "L'article devrait être complété ainsi: 'dans un délai de *6 mois* à dater de la mise en vigueur du présent traité, *et en tous cas, avant le retrait des forces françaises du Fezzan. Cette délimitation maintiendra en territoire français la trouée de Takharkhouri, le col d'Anai, la Gara Derouet et Djemel (cote 10.10) et le puits de Toummo auquel cependant les ressortissants libyens auront accès.*
>
> *A l'est de Toummo la délimitation de la frontière sera l'objet d'une convention ultérieure entre les Hautes Parties Contractantes.*'"

There is absolutely no evidence in the *travaux* to indicate that this alternative version was ever tabled. Ambassador Dejean was presumably authorized to draw upon it only if he could not achieve agreement upon the text of Article 3 which he did not table. Nevertheless, the alternative version is a significant indicator of French intentions, since it demonstrates that the French Government would have been prepared to accept a text specifically stating that the delimitation of the boundary to the east of Toummo will be the subject of a later convention between the High Contracting Parties. This is in itself sufficient to dispose of the first Chad theory that the 1955 Treaty itself provided for the delimitation of the boundary east of Toummo.

That the French negotiators faithfully followed their instructions in this respect seems beyond dispute. There is absolutely nothing in the *travaux préparatoires* of the 1955 Treaty relating to boundaries to show that the southern boundary east of Toummo was ever discussed in substance. Even Chad admits that boundary negotiations preceding the conclusion of the 1955 Treaty bore virtually entirely upon the sector between Ghat and Toummo, where the french negotiators were seeking Libyan agreement to a *rectification* of the boundary to ensure that it passed through three identified points (CMC, para. 11.123). That boundary had, of course, been fixed by the Franco/Italian Agreement of 12 September 1919. Libya did, at the last moment, agree to this proposed rectification, under considerable pressure from the French negotiators; and the text of what was agreed by way of identification of these points was embodied in Annex I to the 1955 Treaty. But even the identification of these three points did not, as I will shortly demonstrate, have the effect of delimiting finally the rectified boundary in this sector, since the text in Annex I left open the course of the line joining the three identified points, and indeed joining the final agreed point to Toummo.

Chad has of course argued that the inclusion of Article 3 and Annex I in the 1955 Treaty testifies to the intention of both Parties to reach a comprehensive and definitive settlement of all outstanding questions concerning Libya's boundaries with adjoining territory, and Chad has cited, in this context, a well-known passage from the Advisory Opinion of the Permanent Court in the case concerning the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (MC, p. 68, para. 80 and CMC, p. 507, para. 11.72). Libya does not dispute the general thrust of that particularly passage, but contends that it has no application to the present case. In the first place, the text of Article 3 of the 1955 Treaty, particularly having regard to the use of the word *reconnaissent*, signifies that the parties did not envisage Article 3 as fixing any boundary or partial boundary, but rather as constituting a recognition by France and Libya of those boundaries which had already been fixed by international acts in force as of the date of Libya's independence, subject of course to any rectification of those boundaries brought about by the combined effect of Article 3 and Annex I. In the second place, the *travaux préparatoires* of the 1955 Treaty amply confirm that

neither France nor Libya wished to discuss, far less agree upon, the course of the hitherto undelimited boundary between Libya and Chad east of Toummo. That France did not wish to do so is plainly attested to by the following evidence:

(1) the letter of 2 May 1955 from the Governor-General of French Equatorial Africa to which I have already referred (LM, pp. 370-372, paras. 5.437-5.439);

(2) the documents prepared in Paris and brought to Tripoli by Ambassador Dejean on the resumption of the negotiations in July 1955. I drew attention to these documents only a few moments ago (RL, Supp. Ann. No. 6.6, point 1).

That Libya equally did not wish to do so emerges clearly from the Libyan minutes of the July negotiations. Thus, the Libyan Prime Minister is recorded as having said at a very early session of the resumed negotiations on 20 July 1955, that

> "the question of the frontiers has no connection with the Treaty and it must not be linked with it, especially since the drawing of the frontiers requires experts and specialists who are not currently available in Libya" (ML, p. 382, para. 5.459).

Admittedly, Libya was later persuaded to withdraw from this rather over-rigid position, at least to the extent of showing willingness to negotiate on a limited rectification of the boundary between Libya and Algeria — but only the boundary between Libya and Algeria.

The *travaux préparatoires* of the 1955 Treaty are singularly silent on the genesis of the list of *actes internationaux* in Annex I. Chad offers no real explanation for this strange gap in the French archives beyond the bizarre frankly unbelievable speculation that the question of the delimitation of Libya's southern boundary was relatively secondary in the eyes of the parties as a result of the unequivocal position taken by France before the United Nations in 1950 and 1951. There is also a suggestion, which may appear as disingenuous to Members of the Court as it does to me, that there was no need to have records or reporting telegrams of the final stages of the negotiations at the beginning of August 1955 since the negotiations at the beginning of August 1955 since the negotiations resulted in an agreed text, namely, the Treaty of 10 August 1955 (RC, p. 117, paras. 5.10 and 5.11). As one who participated in a wide variety of treaty negotiations over a period of more than 30 years, I think I can confidently assert that this is contrary to all experience.

Now, Chad has annexed to its Reply some 30 documents purporting to be the French *travaux* of the July-August negotiating sessions in Tripoli. But the French *travaux* appear to be incomplete. For example, there is no French report on the 20 July negotiating session, although the Libyan minutes (see ML, p. 382, para. 5.459) record an important discussion on boundaries, in which, as I have just indicated, the Libyan Prime Minister insisted th[illegible]ue question of the frontiers has no connection with the Treaty and it must not be linked with it". Is it really credible that the French negotiators did not report to Paris on this? Again, although the telegrams at Annexes 112 (Paris to Tripoli) and 113 (Tripoli to Paris) to the Chad Reply are both dated 26 July, neither concern boundaries; and yet we know from the more limited Libyan records (see ML, p. 382, para. 5.460) that, on 26 July, the two parties agreed to an "interpretative letter" relating to the frontiers and similarly they agreed to the formation of a Franco-Libyan Committee to demarcate the frontier. This would seem to have been a reference to the *procedure* whereby effect would be given to whatever was agreed subsequently about the rectification or clarification of the boundary between Ghat and Toummo since, as we know, the "frontier" which the Franco-Libyan Committee was to demarcate was the boundary between Ghat and Toummo.

Both sides have produced *travaux* relating to the important discussion of boundaries at the negotiating session on 28 July (see ML, p. 382, para. 5.460 and Ann. 117 to the RC). The two records do not match all that closely. But what is clear from the French record is that, even at this late stage, the Annex I list had not yet appeared, since it is specifically mentioned in the French record that the formula already agreed for the content of Article 3 — namely, that the boundaries are those which result from international acts in force as of the constitution of the Kingdom of Libya — was maintained. Annex 120 to Chad Reply, constituting of a dispatch from Ambassador Graham in Tripoli to the Foreign Office of 30 July, reports on a conversation which Graham had with Ambassador Dejean on 29 July confirming the accuracy of the French record of the 28 July negotiating session on this particular point.

The only occasion on which reference is made to the Annex I list in the French *travaux* most recently made available by Chad is in Annex 130 to the Chad Reply. This is the text of the

Aide-Mémoire given to the Libyan Prime Minister on 8 August by Ambassador Dejean. In that Aide-Mémoire, it is specifically stated:

> "Nous avons admis, dans l'Article 3 du Traité . . . que les frontières étaient déterminées par les actes internationaux en vigueur. Nous sommes d'accord sur la liste de ces actes."

Ignoring for the time being the inaccuracy of the citation from Article 3 in this Aide-Mémoire, this is the first indication in the French *travaux* of the existence of the Annex I list.

Mr. President, this is possibly the time at which we should have a break for coffee. I am sorry to have kept the Court going for such a long period of time.

The PRESIDENT: This will be a convenient time, Sir Ian, and we will go along now.

The Court adjourned from 11.20 to 11.40 a.m.

The PRESIDENT: Please be seated. Sir Ian Sinclair.

Sir Ian SINCLAIR: Well, Mr. President, Members of the Court, before our welcome coffee break I had been summarizing the French *travaux* on the appearance of the Annex I list. So what conclusions can we draw from this summary? Surely, first, that the French *travaux* are incomplete. We know already that the Libyan *travaux* are incomplete. Libya frankly admitted, in paragraph 5.459 of its Memorial, that its records relating to phase two of the negotiations, consisting of unsigned minutes, were "quite limited". This is hardly surprising, given the sparse resources in knowledgeable manpower available to the Libyan negotiating delegation at the time. But the same can hardly be said of the French delegation. It is, in our view, virtually beyond belief that the Annex I list should have made its appearance in the text sometimes between 28 July and 8 August without any mention being made in the French *travaux* of the reasons why the French delegation should so suddenly, and at so late a stage, have insisted on the inclusion of such a list in Annex I. Even Chad appears to concede that the French *travaux* on the boundary question are incomplete, since, in paragraph 5.11 of the Chad Reply, reference is made only to French diplomatic archives accessible to the public.

Secondly, Ambassador Dejean had already, as a result of the 28 July negotiating session, reported to Paris, and indeed to Ambassador Graham, that the boundary question had been settled to France's satisfaction — and this even before the Annex I list had made its appearance. (See Annexes 117 and 120 to the RC). This is sufficient in itself to dispose of the Chad argument (advanced in the CMC, p. 528, para. 11.126) that the inclusion of the list of international acts in Annex I had the effect of changing the method of delimitation. This is pure speculation, for which not a shred of evidence exists. And it is belied by the content of the Annex I list itself which, although incomplete and including certain "acts" not in force on the date of Libya's independence, clearly was designed simply to identify the *actes internationaux* to which reference was made in Article 3.

It could well be that the reference in the Libyan minutes of 26 July to the two parties having agreed to "an interpretative letter relating to the frontiers" was simply an agreement to draft such an interpretative letter. What its precise content would be was left undecided. Indeed, it had to be left undecided until the very last moment because, as we know, the negotiating delegations did not agree to the third point on the Ghat to Toummo line until 9 August — the day before signature of the Treaty. And we know that the text of Annex I identifies the three points on the Ghat to Toummo line. There is no evidence to show that, as early as 26 July, the French delegation indicated their wish to see included in the proposed "interpretative letter" the list of international acts which eventually appeared there. All one can say with certainty on the basis of the available evidence is that the final text of Annex I could not have been agreed between the two delegations until 9 August and that the list must have been included in what was subsequently to become Annex I some time between 26 July and 9 August.

This chronological analysis is by itself sufficient to destroy the Chadian argument that the inclusion of the list of international acts in Annex I served somehow to change the method of delimitation agreed upon by virtue of the text of Article 3 itself. The Annex I list is regarded as being of such minor significance that no reference will be found to it in the *travaux préparatoires* of the 1955 Treaty until we suddenly note that, in Ambassador Dejean's Aide-Mémoire to the Libyan Prime Minister of 8 August (Annex 130 to the RC), mention is made of the two sides being in agreement on the list of international acts referred to in Article 3. The astonishing lack of evidence as to the genesis of the Annex I list and as to the date on which that list was incorporated into the text of Annex I certainly does not suggest that the list was intended to do more than identify the principal international acts which are or might be relevant to the delimitation of the frontier as a whole.

Now, Mr. President, the French *travaux* are also illuminating in a negative way in shedding light on the relationship between Article 3 of the 1955 Treaty and General Assembly resolution 392 (V). The Court will have noted that neither the preamble to the 1955 Treaty nor the text of the Treaty itself make any reference to this resolution which, as I have already argued,

sufficiently identified the contested boundary east of Toummo as being "the portion of [Libya's] boundary with French territory not already delimited by international agreement". Chad's position on the significance of the resolution has changed markedly during the development of the written pleadings. Initially, Chad sought to argue that resolution 392 (V) supported the thesis that Libya's southern boundary had been already delimited by international agreement, and that it was accordingly unnecessary to have recourse to the procedure recommended in that resolution (MC, Chap. I, p. 30, para. 63). By way of sharp contrast, but within the framework of the same written pleading, Chad maintained that the negotiation of the 1955 Treaty had particularly as its object the fulfilment of the mandate conferred by resolution 392 (V) (MC, Chap. III, p. 115, para. 55). These contradictions are not resolved by what Chad says in its subsequent written pleadings. In its Counter-Memorial, Chad appears to argue that the object and purpose of resolution 392 (V) was to ensure that Libya's external boundaries should be completely delimited so as to leave no room for any dispute in future. But then, after reciting the terms of Article 3 of the 1955 Treaty, the Chad Counter-Memorial revealingly adds: "Il s'agit en quelque sorte de la réaffirmation sous une autre forme des termes de la résolution 392 (V)" (CMC, p. 533, para. 11.137).

So, in Chad's view, Article 3 of the 1955 Treaty is simultaneously the fulfilment of, and the reaffirmation of, resolution 392 (V). But I would submit, Gentlemen, that in terms of pure logic it simply cannot be both. One cannot, at one and the same time, seek to maintain that Article 3 of the 1955 Treaty gives effect to resolution 392 (V) and yet amounts to no more than its restatement. The Court may recall the following dialogue from the Mad Hatter's tea party in Lewis Carroll's *Alice in Wonderland*.

> "Then you should say what you mean", the March Hare went on.
>
> "I do", Alice hastily replied; "at least — at least I mean what I say — that's the same thing you know."
>
> "Not the same thing a bit!" said the Hatter. "Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'."

Mr. President, Libya would submit that there can be no room here for the kind of verbal pyrotechnics represented by that dialogue. The plain fact of the matter is that Chad has no

convincing explanation to offer for the relationship between resolution 392 (V) and the 1955 Treaty. Libya's position on that relationship is, on the other hand, simple and fully in keeping with the facts. Resolution 392 (V) had called upon Libya and France to delimit Libya's southern boundary as being "the portion of [Libya's] boundary with French territory not already delimited by international agreement". This was not done in the 1955 Treaty, as is confirmed by the fact that no reference is made to the resolution in the text of the 1955 Treaty nor indeed in the preamble. It was not done because neither party to the negotiations wished it to be done. Libya's basic position was that boundary questions should not be dealt with in the 1955 Treaty. In order to achieve its signature, Libya had however (with great reluctance) to accept a rectification or clarification of the boundary in the sector between Ghat and Toummo. France's position, for quite different reasons, was also that there should be no substantive negotiations on Libya's southern boundary east of Toummo. This was because the French negotiators were following instructions *not* to open up for discussion the legal basis for France's long-held theory that, despite the terms of resolution 392 (V), Libya's southern boundary east of Toummo *had* already been delimited by international agreement. This reflects the deep-seated ambivalence of the French position. On the one hand, the French negotiators could not abandon that theory. The then French Government had admitted in 1935, as you will hear, that the boundary between Libya and French Equatorial Africa east of Toummo had not been delimited by international agreement, in the context of the *Exposé des Motifs* accompanying the draft French law authorizing ratification of the Franco/Italian Treaty of Rome concluded earlier in 1935; but the refusal of Italy to proceed to an exchange of instruments of ratification of that Treaty, which *would* have established such a boundary, effectively forced France in the immediate post-war period to resuscitate the earlier theory. On the other hand, there was clearly extreme nervousness on the part of some French administrators (in particular, the Governor-General of French Equatorial Africa) to expose that theory to discussion in the context of the negotiations with Libya in 1955; and this explains why the French negotiators in 1955 were content not to press for a delimitation of the boundary east of Toummo but simply to establish a formula which could serve as the basis for subsequent and separate negotiations between France and Libya to fix (or, if you like, in the French

view, to confirm) that boundary. But of course no such subsequent negotiations took place.

In the light of these indicia from the *travaux* of the 1955 Treaty, the Court may well ask: what, in Libya's view, is the true meaning of Article 3 of the 1955 Treaty, read in conjunction with Annex I? The short answer is that Libya relies on the natural and unstrained meaning of the language used in Article 3: that the two parties by virtue of this provision, are recognizing that the boundaries dividing the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa, on the one hand, from the territory of Libya, on the other hand, are the boundaries which result from international acts in force on the date of Libya's independence, as listed in Annex I. This is purely declaratory of the boundary situation as of the critical date, which both parties acknowledge to be the date of Libya's independence. If boundaries result from any of the international acts in force on the date of Libya's independence, those boundaries are to be recognized as boundaries between Libya, on the one hand, and France on the other in respect of the French possession or territory concerned. But if, in respect of any particular sector of the total boundary between Libya and French possessions or territory, no boundary results from any of those international acts, then Article 3, read with Annex I, cannot be interpreted as creating *ex novo* such a boundary. Libya is wholly confident that the *travaux préparatoires* of the 1955 Treaty confirm this interpretation of the text. It is Libya's contention, and Libya will establish this in subsequent presentations, that no international act in force on the date of Libya's independence, whether listed in Annex I or not, had delimited a boundary between Tourmmo and the Sudan boundary establishing the limits of Libyan territory and the territory of its southern neighbour. The Treaty of Rome of 1935, concluded between Italy and France, *would have* delimited such a boundary. But that Treaty never entered into force, for reasons wholly unconnected with the boundary issue.

Now, Mr. President, this pretty well exhausts the guidance which can be obtained from a detailed study of the *travaux préparatoires*. But it remains to be seen whether any light can be shed on the interpretation of Article 3 of the 1955 Treaty from the *context* in which it occurs in the Treaty as a whole. Libya would regard the context of the 1955 Treaty as including not only all the related conventions between Libya and France concluded simultaneously with the 1955 Treaty itself, but

also the Exchange of Letters of 26 December 1956. I will presently come to that Exchange of Letters which, as you will see, modified the boundary line between Ghadames and Ghat to the evident advantage of Algeria. Although this Exchange of Letters post-dates the signature of the 1955 Treaty by some 18 months or so, it must be treated as part of the context of the 1955 Treaty since it was concluded only because France threatened otherwise not to ratify the 1955 Treaty. As the Court will be aware, Article 31, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties defines the "context" of a treaty for the purpose of the general rule of interpretation as comprising, in addition to the text, including its preamble and annexes:

> "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty".

Clearly, the Exchange of Letters of 26 December 1956 falls within this definition since, as will shortly become apparent, France made its ratification of the 1955 Treaty conditional upon Libya's acceptance of the 1956 Exchange of Letters.

Now, it is Chad which seeks to draw ammunition favourable to her case from an examination of the context of Article 3 of the 1955 Treaty. What then is the essence of the Chadian argument so far as it relates to the context of Article 3?

Chad asserts that the context of Article 3 supports her contention that that provision, read in conjunction with Annex I, effects the delimitation of the Libya/Chad boundary east of Toummo by reference to the lines which result from the combination of international acts identified in Annex I, all these acts being deemed to have been *en vigueur* on 24 December 1951. To this end, she relies first on Article 5 of the 1955 Treaty itself. The Court will recall that Article 5 makes provision for consultation between the parties in the event that either of them becomes involved in an armed conflict affecting territories in the continent of Africa situated in the northern hemisphere, by reason of aggression or the imminent threat of aggression by another Power. The consultation envisaged is for the purpose of ensuring the defence of their respective territories. As regards France, the territories concerned are defined as those for which France has assumed he defence and which border on Libya — that is to say, Tunisia, Algeria, French West Africa and French Equatorial Africa. As regards Libya, the territory concerned is stated to be Libyan territory as defined in Article 3 of the

Treaty. And Chad seeks to extrapolate from this reference to Libyan territory in Article 5 of the Treaty an acknowledgement by Libya that Article 3 has comprehensively delimited Libya's boundaries with neighbouring territories.

The Court will of course hardly be deceived by this extravagant assertion. The phrase on which Chad relies is a simple cross-reference back to Article 3 and is wholly consistent with the view that part of Libya's boundaries with neighbouring French territories may have resulted from international acts in force on the date of Libya's independence and opposable to Libya, and another part may have been left undetermined, thus requiring still to be delimited by subsequent negotiations between France and Libya on the basis of the criteria indicated in Article 3 of the Treaty itself.

We know, for example, that the Franco/Libyan negotiations in 1955 did not finally resolve the disputed question of the course of the boundary line between Ghat and Toummo. France had succeeded in securing, in the text of Annex I to the 1955 Treaty, Libyan agreement to the proposition that the boundary line should pass through the three identified points of the trouée de Takharkhouri, the Col d'Anai and point 1010. But this left entirely at large what should be the course of the line joining these three points, and indeed the course of the line joining point 1010 to Toummo. As the Court will see from the sketch illustrating possible boundary scenarios between point 1010 and Toummo, the course of the boundary between point 1010 and Toummo was not resolved during the 1955 negotiations, nor indeed subsequently. The sketch map now illustrated is based directly upon the map accompanying a note of 9 September 1960, from the "Service du Levant" of the Quai d'Orsay addressed to the Service responsible for the Affairs of the French Community (RL, Exh. 6.9). It will be equally clear to the Court that Article 3 of the 1955 Treaty, read in conjunction with Annex I, did not definitively delimit that sector of the boundary between Libya and Algeria which joins Ghadamès and Ghat. This is because, as we are already aware, France insisted in 1956 on rectifying this sector of the Libyan/Algerian boundary to secure the inclusion of the whole of the Edjelé oil field in Algerian territory, and indeed threatened not to ratify the 1955 Treaty unless this additional rectification were made. So, Mr. President, all the Chadian claims that Article 3 of the 1955 Treaty, read in conjunction with Annex I, had exhaustively delimited Libya's boundaries with

neighbouring French possessions or territories are shown to be false. Libya can cite numerous admissions in documents prepared by French officials subsequent to 1955 to the fact that the boundary between Ghat and Toummo remained to be delimited, notwithstanding the terms of Annex I to the 1955 Treaty. For example, in a note of 15 July 1958, from the "Service du Levant" of the Quai d'Orsay (RL, Exh. 6.9, first document) reference is made to Annex I to the 1955 Treaty.

But, the note continues (in English translation):

> "However, the boundary has not been delimited on the ground and this imprecision has been a source of incidents. Two serious incidents occurred on 17 September and 3 October 1957."

In a further note from the "Service du Levant" of the Quai d'Orsay of 11 February 1960 (RL, Exh. 6.9, sixth document), it is specifically stated (again in English translation, and this is simply a short extract from the document):

> "From Ghat to Toummo, the boundary between France (in respect of Niger) and Libya remains imprecisely defined by the Franco/Italian Arrangement of 1919 and the Franco/Libyan Treaty of 10 August 1955. The Libyan Government, supporting the territorial pretensions of its Touareg tribes, has never accepted the proposals of the French Government to proceed to the precise delimitation and demarcation of this part of the boundary . . ."

Even as late as April 1968, a note prepared in the Quai d'Orsay on the boundary between Algeria and Libya south of Ghat admits quite frankly that between Ghat and Toummo there has been no delimitation of the boundary:

> "Aucune délimitation n'ayant encore été effectuée sur le terrain, des zones contestées subsistent notamment au Sud de Ghat, et cette situation favorise la naissance d'incidents de frontière." (RL, Exh. 6.9, eleventh document.)

Perhaps even more illuminating is a comment made by the French Ambassador to Libya in a despatch to the French Foreign Minister of 13 April 1961 (shortly after Chad's independence). This despatch analyses Libya's boundary problems and it contains the following passage:

> "Je sais très bien que les Libyens se mordent les doigts de n'avoir pas essayé de discuter avec nous la question de leur frontière avec le Tchad et le Niger quand il en était encore temps; ils comprennent maintenant que les 'frères africains' se montreront des adversaires encore plus difficultueux." (RL, Exh. 6.7 (tenth document).)

There could be no clearer statement that, in 1961, the French Ambassador to Libya regarded the boundary between Libya and Chad as still remaining to be delimited.

These are but a few examples of a series of French official documents post-1955 which testify to an unqualified acknowledgement on behalf of France that Article 3 of the 1955 Treaty had by no means resolved all boundary problems between France and Libya. In the face of all this evidence, this cloud of witnesses, how can it be plausibly contended that the simple cross-reference to Article 3 which is contained in Article 5 of the 1955 Treaty is sufficient to create a presumption that the effect of Article 3 was comprehensively to delimit all Libya's boundaries with neighbouring French territories or possessions? If even French officials frankly admitted in 1960 that the 1955 Treaty did not delimit the sector from Ghat to Toummo and the sector from Toummo to the Sudanese frontier, and that these sectors remained to be delimited as a result of negotiations with Libya, how can Chad now advance arguments so clearly at variance with the facts?

Now, Chad also invokes the provisions of Articles 1, 9, 10 and 11 of the "Convention de bon voisinage", and Article II of Annex III to the "Convention particulière" in support of her argument that the context of the 1955 Treaty is consistent only with the Chad contention that Article 3 operates to delimit exhaustively all Libya's boundaries with neighbouring French territories. Chad argues that Article I of the "Convention de bon voisinage" confirms that all Libya's boundaries are defined by Article 3 of the Treaty (CMC, pp. 499-500, para. 11.56). But this is simply a repetition of the Chad argument with respect to Article 5 of the Treaty itself and is open to precisely the same objection as I have just indicated.

What might appear to be of greater significance are the references to selected geographical features in Articles 9, 10 and 11 of the "Convention de bon voisinage". Article 9 is a general provision whereby the two Governments undertake to provide facilities for the free movement of nomads from tribes traditionally trading on one side or the other of the boundary in order to maintain the traditional caravan routes between certain named regions.

Article 10 establishes a wide zone open to caravan traffic practised by nomads who were holders of a special card. It identifies this zone, on one side or other of the boundary, as being limited, in "French territory" by a line passing through certain specified locations and in "Libyan territory" by a line passing through other specified locations. The map which we are about to show

shows the extent of the Article 10 zone. It will, of course, be noted that the 1955 "Convention de bon voisinage" concerned the entire frontier area between Libya and adjoining French territories for the defence of which France had assumed responsibility. Thus, some of the specified locations are in present-day Algeria or Niger.

It will be apparent to the Court that the object and purpose of the 1955 "Convention de bon voisinage" was to record agreement on practical measures necessary for ensuring frontier security and for assisting cross-frontier circulation. Many of these practical measures had indeed been recommended in a letter of 10 February 1955 from the Ministre de la France d'Outre-Mer to the French Minister of Foreign Affairs, drawing upon earlier proposals which he had made on 27 July 1953 (RL, Exh. 6.6).

The Minister draws a clear distinction in this letter between the *régime frontalier* and the course of the boundary itself. The *régime frontalier* has no bearing on the course of the boundary. What is of course particularly interesting about the Article 10 zone that you can see is that it left a great deal of leeway for the subsequent determination of a boundary line within the limits which it fixed. As can be seen, both a strict south-east line in accordance with Article 3 of the 1899 Additional Declaration and the line fixed by the 1935 Franco/Italian Treaty would fit easily into the zone. But of course the object and purpose of the Article 10 zone was simply to indicate the area within which the nomadic tribes were accustomed to circulate. It was not to determine questions of title to territory as between Libya and France. In this context, the Court will readily recall that, within the framework of the "Convention de bon voisinage" as a whole, *territoire français* was defined as meaning territories for the defence of which France had assumed responsibility. Accordingly, no implication can be drawn from the references to *territoire français* in Article 10 of the Convention that the named locations necessarily lie on the French side of any boundary line that might eventually be established between the parties or their successors in title.

Now, the final element, Mr. President, of the "context" of Article 3 on which Chad relies is the reference of Article II of Annex III to the "Convention particulière" to Piste No. 5. Piste No. 5 is the route which, starting from a point in Tunisia proceeds southwards and southeastwards and "pénètre

en territoire du Tchad dans la région de Muri Idie". As explained at paragraph 55 of the Libyan Reply, this description is far from being precise, as is shown by the map here illustrated. It will be seen that the map shows both a *Col de Mouri Idie* and a geographical feature named *Mouri Idie* itself. Which one is meant? Moreover, the description is deliberately vague: *dans la région de Mouri Idie* does not give an exact indication of a crossing-point, even if one could identify which geographical feature is meant.

Finally, Mr. President, in analysing the "context" of Article 3 of the 1955 Treaty, Chad deliberately leaves out of account the Franco/Libyan Exchange of Letters of 26 December 1956. Chad does not ignore this Exchange of Letters entirely, but endeavours to downgrade its significance. What are the facts? The Franco/Libyan Treaty was signed on 10 August 1955. It was signed subject to ratification. The Court will be aware that one of the related Franco/Libyan agreements, also signed on 10 August 1955, was the Agreement relating to the withdrawal of French forces from the Fezzan. This provided for the withdrawal of French forces from the Fezzan to be completed by 30 November 1956. However, the French Government of the day did not even present the 1955 Treaty to the Assemblée nationale in Paris for approval until 13 November 1956, some 15 months after signature. Why the delay? The French Government were no doubt nervous about securing the necessary approval from the Assemblée nationale for the Bill which would authorize ratification of the 1955 Treaty, particularly at a time when France's relations with the Arab world were strained. But I would suggest that another, and more significant, consideration was involved. At the end of 1955, it was confirmed that oil, in commercial quantities, had been discovered in the vicinity of Edjelé, at a location very close to the line fixed by the Franco/Italian Arrangement of 1919. But France knew, much earlier, that there was every likelihood that this would be a major oil strike. It was clearly in France's interest to ensure that the line between Ghadamès and Ghat, although in principle delimited by the Franco/Italian Agreement of 1919, be rectified in such a way as to ensure that the bulk of the Edjelé oil field fell on the Algerian side of the line. At French insistence, negotiations were accordingly re-opened between Libya and France in the early months of 1956 with a view to delimiting more precisely the boundary line between Ghadamès and Ghat.

These negotiations, which were to result in the Exchange of Letters of 26 December 1956, were still continuing in November 1956. Again, it was very much in France's interest in her ongoing negotiations with Libya in 1956 to magnify the difficulties which the French Government were encountering with the Assemblée nationale in securing Parliamentary approval to ratify the 1955 Treaty. In this context the Court will recall the episode of the Isorni amendment which is referred to in the Libyan Memorial at paragraphs 5.498 to 5.499.

It is incidentally the 1956 Exchange of Letters which gives the lie to the Chad arguments that Article 3 of the 1955 Treaty finally accomplished the delimitation of Libya's boundaries with adjoining French territories. The boundary between Libya and Algeria was the most sensitive from the French point of view, for Algeria was, at this time, a department of metropolitan France. Yet during the 1955 negotiations, the French demands for rectification of the Libyan/Algerian boundary had been limited to securing Libyan agreement to the three identified points between Ghat and Toummo. No question had been raised by France as to the course of the line between Ghadamès and Ghat. It is only some months *after* signature of the 1955 Treaty, but *before* that Treaty had been submitted to the French Assemblée nationale for approval, that France raises the issue of the course of the boundary between Ghadamès and Ghat, particularly in the area of Edjelé. In the summer of 1956, French officials recommended that it should be made clear to the Libyan Prime Minister that the outcome of the French Parliamentary debates on the ratification of the 1955 Treaty would depend largely on the result of the continuing negotiations on the course of the boundary between Ghadamès and Ghat. Little attempt is made to disguise the element of blackmail involved.

Thus, an undated note for the President of the Council of Ministers prepared jointly by the Direction générale des affaires politiques and the Direction d'Afrique-Levant of the Quai d'Orsay and, from internal evidence, submitted in July or August 1956, is devoted to the need for the French Government to define its position with respect to the ratification of the 1955 Treaty. The note points out that the renewed negotiations about the delimitation of the Libyan/Algerian boundary will run into serious difficulties if the 1955 Treaty is not ratified, and it continues:

> "Or, un arrangement frontalier est indispensable si nous voulons conserver le très important gisement pétrolier récemment découvert à Edjelé, et dont la possession est vitale non seulement pour l'approvisionnement futur de la France en pétrole mais aussi

pour le développement économique de l'Algérie."

The note then goes on to recommend *inter alia* that the leader of the French delegation in Tripoli should make it known confidentially to the Libyan Prime Minister that the outcome of the French Parliamentary debates on ratification of the 1955 Treaty will depend in large measure on the result of the discussions on the delimitation of the boundary; in other words, he would indicate that if these discussions resulted in a solution satisfactory to France, the French Government would undertake to hasten as much as possible the procedure of ratification and to use all its authority to bring about this solution.

A later joint note of 13 November 1956, from the same source in the Quai d'Orsay, is revealingly candid about French objectives in the continuing negotiations about the delimitation of the boundary between Ghadames and Ghat:

> "Entre Ghat et Ghadamès, où d'importants gisements pétroliers ont été récemment décelés, notre intention est de demander au Gouvernement libyen de consacrer dès maintenant, par un échange de lettres, la définition française de la frontière algéro-fezzanaise plaçant les zones les plus intéressantes en territoire algérien *en dépit des dispositions peu favorables que contiennent, à ce sujet, les textes internationaux*." (Emphasis added.)

Here, there is a clear admission that France is seeking to modify, for her own benefit and that of Algeria, existing international agreements defining the boundary between Algeria and the Fezzan in a manner less favourable to French interests. The same note goes on to indicate that the withdrawal of French forces from the Fezzan should be made conditional upon the prior acceptance by Libya of these proposals. It is no exaggeration, therefore, Mr. President, to apply the term "blackmail" to French conduct in the negotiation of the Franco/Libyan Exchange of Letters of 26 December 1956. Both the notes from which these extracts are taken are at RL, Exh. 6.7.

Now the Exchange of Letters of 26 December 1956, modified the line between Ghadames and Ghat which had been fixed by the Franco/Italian Arrangement of 1919 in such a way as to ensure that the Edjelé oil field was fully incorporated within Algerian territory. The Court will now see on the map the extent of the territorial gains achieved by France by virtue of this Exchange of Letters. It clearly formed part of the context of the 1955 Treaty, since it was made between Libya and France in connection with the conclusion of the 1955 Treaty, as the foregoing evidence amply confirms.

There are other elements of French and Libyan conduct which may not, strictly speaking, form part of the context of the 1955 Treaty, but which certainly have to be taken into account as being part of the circumstances of the conclusion of that Treaty.

One such element of conduct bearing upon the interpretation of the boundary provisions of the 1955 Treaty is *Libyan Petroleum Regulation No. 1* and *Map No. 1* of 14 August 1955. As Mr. Maghur has already analysed these materials in some depth yesterday, I will forbear from repeating his explanation.

It remains only to consider the "object and purpose" of Article 3 of the 1955 Treaty. Chad assumes that that object and purpose was to achieve a comprehensive delimitation of Libya's boundaries with neighbouring French territories to the east and to the south. Libya makes no such assumption. In Libya's submission, the *travaux préparatoires* of the 1955 Treaty are consistent only with the view that the ambitions of the parties were much less far-reaching. Libya's prime objective was to secure the removal of French forces from the Fezzan. Libya was neither prepared nor equipped to enter into detailed negotiations on the course of her boundaries with neighbouring French territories. Libya was reluctantly persuaded to enter into detailed negotiations on her boundary with Algeria between Ghat and Toummo in the face of the French demand that the boundary line in this sector be rectified so as to pass through the three identifiable points which I have already mentioned. But, as we have seen, Libyan agreement to this demand did not bring about a delimitation of the boundary even in this sector, as French officials frankly admitted several years later. Nor can it be said that the unqualified object and purpose of the *French* delegation during the 1955 negotiations was to achieve such a comprehensive delimitation of Libya's boundaries with neighbouring French territories. The evidence that the French delegation was under instructions during both phases of the 1955 negotiations not to open up for discussion the legal basis for the French theory that Libya's southern boundary between Toummo and the Sudanese frontier had *already* been delimited is compelling. But why was the French delegation required to act under such constraints? What did they have to fear? Was it because the French Government well knew that their theory as to existence of a conventional boundary east of Toummo would not stand up to close

scrutiny? Was it because, to adapt the story of Hans Christian Andersen, the Emperor would be revealed as having no clothes? The questions are no doubt rhetorical, but they are none the less suggestive of the answers that inevitably present themselves.

Now, Mr. President, this still leaves open a series of unresolved questions bearing on the interpretation of Article 3, read in conjunction with Annex I. The first, and possibly the least important, is whether the Annex I list was intended to be an exhaustive or a non-exhaustive listing of the international acts relevant to a determination of the boundary east of Toummo. Libya has already given in its written pleadings its reasons for regarding the Annex I list as being non-exhaustive (see CML, pp. 51-52, paras. 3.12 to 3.16 and RL, pp. 37-38, paras. 4.09 to 4.11).

The second, and more significant, unresolved question bears on the interpretation of the phrase *actes internationaux en vigueur* in the context of Article 3. Here we have a striking inconsistency in the Chad position. The natural and unstrained meaning of the phrase *actes internationaux en vigueur* appearing in Article 3 is that one is confined to a consideration of those international acts actually in force as of the date of Libya's independence in 1951 and binding as of that date upon Libya or its predecessor in title. This is the position which Libya takes. It is also the position which Chad takes, at least in its Counter-Memorial. Thus, if you look at paragraph 11.20 of the Chad Counter-Memorial, it unequivocally argues:

> "La frontière ne peut être déterminée que par rapport aux actes internationaux en vigueur à l'indépendance de la Libye. On a ici une double limitation: sont exclus, d'une part les actes non internationaux, comme par exemple des actes administratifs internes aux puissances coloniales et, d'autre part, les actes internationaux qui ne seraient pas ou plus en vigueur le 24 décembre 1951, date de l'indépendance libyenne."

The same point is repeated even more clearly in paragraph 11.42 of the Chad Counter-Memorial, where Chad acknowledges that the Franco/Italian Treaty of Rome of 1935 has to be excluded from consideration not so much because it is not listed in Annex I as because it *never* entered into force and could not therefore fulfil the condition specified in Article 3 itself of being an international act in force as of the date of Libya's independence.

It is perhaps not altogether surprising that Chad in its Reply seems tacitly to have abandoned this position. Chad now appears to be arguing that the failure of France to notify the Franco/Italian

Accords of 1900 and 1902 and the Franco/Italian Agreement of 12 September 1919, under Article 44 of the Italian Peace Treaty is explicable on the basis that, by virtue of Article 23 of the Peace Treaty, Italy had renounced all right and title to its territorial possessions in Africa, that is to say, Libya, Eritrea and Italian Somaliland. Therefore, according to Chad, it was not for Italy, nor for France in the context of its bilateral relations with Italy, to consider treaties relating to the boundaries of the former Italian colonies as maintained, reactivated or abrogated (RC, para. 5.50). Alternatively, Chad appears to maintain that the legal effect of the phrase in Article 3 "tel qu'ils sont définis dans l'échange de lettres ci-jointes (annexe 1)" is to indicate the texts which the parties themselves considered to be *en vigueur* at the relevant time (RC, p. 132, para. 5.55). The weakness of both these arguments is self-evident. Leaving aside the fact that this fundamental change in the Chad position is indicative of a pronounced nervousness on the part of Chad as to the consequences of the clear admissions made in paragraphs 11.20 and 11.42 of the Chad Counter-Memorial, the first new argument presented in the Chad Reply fails to explain why reference was made to the *en vigueur* condition in Article 3 of the 1955 Treaty; nor does it establish by itself that the Franco/Italian Accords of 1900 and 1919 were *en vigueur* as of the date of Libya's independence.

Let us just consider a little bit more closely whether the Franco/Italian Accords of 1900 and 1902 can, as a matter of treaty law, be regarded as having been still in force on the date of Libya's independence, that is to say on 24 December 1951. I need not go into much detail at this stage about the content of these two agreements. Mr. Sohier will, in a later presentation, examine their meaning exhaustively in the light of the circumstances prevailing at the time of their conclusion in 1900 and 1902 respectively. It is sufficient for present purposes for the Court to note that these were originally secret agreements, kept confidential by the parties because they related principally to the recognition by Italy of French rights in Morocco in return for a recognition by France of Italian interests — Italian *interests* note, not Italian rights, — in Tripolitania/Cyrenaica. It would have been extremely awkward for the content of these arrangements to have been made public at the time, as Tripolitania/Cyrenaica was universally acknowledged to be an integral part of the Ottoman Empire in 1900 and 1902. Now, this brief description of the content of the 1900 and 1902

Franco/Italian Accords, coupled with the more elaborate analysis which you will presently hear from Mr. Sohier, will, in Libya's submission, enable the Court to conclude that all the Chadian contentions as to the effect of these two agreements are mistaken. These two agreements are typical of the purely personal compacts made between colonial powers at the turn of the twentieth century, whereby each sought to obtain recognition from the other for the position it had carved out, or was hoping to carve out, in particular parts of Africa. But these agreements of 1900 and 1902 depended for their continuing validity on the retention of the Italian position in relation to Libya — as potential successor to the Ottoman Empire until 1912 and as sovereign power in Libya from 1912 to the entry into force of the Italian Peace Treaty in 1947. Once that position had disappeared, as it did with the entry into force of the Italian Peace Treaty, the raison d'être of the 1900 and 1902 Franco/Italian Agreements also disappeared. Professor Condorelli, in a later intervention, will be discussing the effect of non-registration of these two agreements under Article 44 of the Italian Peace Treaty. I would simply make the point that, quite apart from the legal effect of non-registration under Article 44 of the Italian Peace Treaty, and the motives which might have led France not to register the 1900 and 1902 agreements, there is in fact reason to conclude that the continuance in force of these agreements depended on the continuing retention by Italy of title in respect of Libya so that they automatically ceased to be in force as soon as Italy's renunciation of right and title to Libya took effect.

Now, Mr. President, the alternative argument at paragraph 5.55 of the Chad Reply is highly suspect. It involves attributing to the parties an intent to *deem* certain international acts to have been in force on 24 December 1951, irrespective of whether they were in fact in force on that date. Moreover, it involves attributing to the parties an intent to do this *retrospectively*, since the international acts alleged to have produced a particular boundary must have done so on the critical date, that is to say, 24 December 1951. Prima facie, this is highly unlikely. As we have seen, the Annex I list was included in the text at the very last moment and apparently without discussion. Libya did not have the time to form any considered view as to whether the international acts which France had included in the list were or were not in force on 24 December 1951. This was no doubt

immaterial as regards the Franco/Italian Agreement of 12 September 1919, since the modifications to that Agreement embodied in the text of Annex I itself — that is to say, the specification of the three points through which the line from Ghat to Toummo must pass — those modifications sufficiently indicate that France and Libya were treating that Agreement, or, perhaps more accurately, the effects of that Agreement, as still subsisting on 24 December 1951. The fact remains that the *en vigueur* condition is specified in Article 3 itself and has to be satisfied. That condition is independent of the content of the Annex I list. The Annex I list is prefaced by the phrase "Il s'agit des actes suivants." This would appear to be purely descriptive of the acts themselves and to carry no implication as to whether they were or were not in force on 24 December 1951, a condition which had to be separately and independently satisfied under Article 3.

The fact is that the language of that part of Article 3 which refers to the Annex I list, and of the introductory words to the Annex I list itself, is far from clear. The most natural meaning to be attributed to that language and those words is that they refer to international acts which were actually in force as treaty instruments on 24 December 1951, and (independently of the 1955 Treaty) binding, as of that date, on Libya or its predecessor in title. An alternative, but less likely, meaning is that the language and words refer to international acts which, whether they were or were not in force as treaty instruments on 24 December 1951, had earlier been in force and had established territorial boundaries which were binding on Libya's predecessor in title. On this alternative view, the words *en vigueur* refer to the *effects* of the treaty instrument rather than the treaty instrument itself. But what seems to be excluded, Mr. President, is an interpretation of that language and those words which would cover international acts actually in force on 24 December 1951, in the sense that they were then binding on some entity other than Libya or Libya's predecessor in title, the effect of Article 3 of the 1955 Treaty being to render these acts opposable to Libya. This is excluded because there is nothing in the wording of Article 3 or Annex I to suggest that its purpose was retrospectively to render opposable to Libya international acts which were not opposable to Libya or its predecessor in title as of 24 December 1951.

Now, Mr. President, as I have indicated, Chad has signally failed to produce any *travaux*

préparatoires relating to the genesis of Annex I. In the circumstances, and again bearing in mind the incidence of the *contra proferentem* rule in the interpretation of treaties, upon which Libya has enlarged in the Libyan Counter-Memorial (CML, paras. 7.31-7.37), Libya is confident that the Court will reject the argument advanced in paragraph 5.55 of the Chad Reply.

Now, the third unresolved question bearing on the interpretation of Article 3 relates to the issue of the extent to which colonial *effectivités* are to be excluded in the determination of the boundary east of Toummo. The *travaux préparatoires* amply confirm that France, which was the author of Article 3, firmly believed that a boundary line separating Libyan territory from the territory of French Equatorial Africa (now Chad) *would* result from the international acts in force on the date of Libyan independence. Libya, not having studied the matter in any detail and not being equipped at the time with sophisticated legal advice on boundary matters, was not in a position to challenge the view that a boundary line might result from these acts; but it clearly could not commit itself to the view that such a boundary line did result from these acts. Hence the careful and cautious language of Article 3. What is important to bear in mind, however, is that the French were relying exclusively on a conventional boundary resulting from identified or identifiable international acts. This accorded with the long-held French theory developed initially in the 1920s. Thus, in 1955, Article 3 was drafted on the assumption that a boundary line east of Toummo might or, in the French view, would result from one or more of the international acts to be listed in Annex I. It simply did not address the issue of the relevance of colonial *effectivités* in the event that a conventional boundary east of Toummo and opposable to Libya did not result from any of the international acts concerned, whether or not listed in Annex I.

Now, the Court will be aware that Libya's basic contention is that none of the international acts on which Chad seeks to rely established a territorial boundary east of Toummo opposable to Libya or indeed to Italy or the Ottoman Empire as Libya's predecessors in title. If this is correct, and Libya is firmly convinced that it is correct, then Article 3 ceases to be relevant as regards the determination of that boundary. What then would be the position? Article 3 had, by clear and inescapable inference, excluded reliance on colonial *effectivités* as a factor to be taken into account

in determining a boundary pursuant to its terms. But if Article 3 ceases to be relevant to the determination of the boundary east of Toummo, can one continue to ignore colonial *effectivités*? Even assuming that, in 1955, France firmly believed that a conventional boundary east of Toummo would result from the relevant international acts, there is, in Libya's view, insufficient evidence to indicate that France was totally abandoning any reliance on colonial *effectivités* as an element to be taken into account in the determination of that boundary if that firm belief proved in the event to be unfounded. In principle, and on the assumption that a conventional boundary east of Toummo does not result from any of the international acts concerned (and this is Libya's contention), whether listed in Annex I or not, the position must be that that boundary will result from the application of rules of general international law relating to the determination of title to territory in dispute. Libya has already indicated, in its written pleadings, the elements which, in its view, are to be taken into account in determining title to territory in the absence of a conventional boundary. Libya will of course revert to this major aspect of the case in the second half of its oral pleading. Libya has demonstrated that the Libya/Chad borderlands were not *terra nullius* in the opening years of the 20th century when Chad asserts that France acquired title by occupation. Libya relies *inter alia* on the Court's Advisory Opinion in the *Western Sahara* case in support of the proposition that the borderlands were not *terra nullius* at the relevant time. But even if this were not so, there is no evidence that France acquired a valid title to the borderlands by way of effective occupation by 1914 (or even by 1919). And after 1919, acquisition of title to territory as a result of the use of armed force was prohibited as a matter of general international law.

It is curious that France should so decidedly have sought to exclude reliance on colonial *effectivités* in the text of Article 3. France was obviously concerned that Italian colonial *effectivités* (particularly during the period from 1940 to 1943) that those Italian colonial *effectivités* could cast a significant measure of doubt on the French claim to title over the borderlands; the *travaux préparatoires* of the 1955 Treaty confirm this. It may be also that France was indirectly accepting that military occupation based on conquest could not, after 1919, constitute a good claim of title to the borderlands and so was prepared to exclude colonial *effectivités* as an element in the

determination of title under Article 3 of the 1955 Treaty. Whatever the reason, there can be no doubt that the deliberate exclusion by France of colonial *effectivités* as an element to be taken into account in determining a boundary under Article 3, is strongly indicative of a complete lack of confidence by France in the validity of any argument, whether on the law or on the facts, that she could have established title to the borderlands on the basis of colonial *effectivités* alone or in conjunction with any of the relevant international acts.

Now, Mr. President, I am coming to the end. But there is just one other feature of the circumstances surrounding the conclusion of the 1955 Treaty to which I must draw attention: and that is the deliberate failure of France to register the Treaty with the United Nations Secretariat under Article 102 of the Charter until the year 1991, and then only at the request of the Government of Chad. The facts are fully set out in the Libyan written pleadings: see ML, paras. 2.12 and 5.504 to 5.510 and RL, paras. 5.67 to 5.69.

In its Memorial, Libya had contrasted France's deliberate failure to register the 1955 Treaty shortly after its conclusion with France's eagerness to register the Franco/Libyan Exchange of Letters of 26 December 1956. Which as we know modified the Franco-Italian Agreement of 1919 to ensure that the Edjelé oil field fell on the Algerian side of the boundary line. So this Exchange of Letters of 1956 genuinely did purport to establish an international boundary. And what happens? France promptly files the Exchange of Letters for registration with the United Nations Secretariat under Article 102 of the Charter, and the registration duly takes effect on 19 May 1958. This is some three-and-a-half years before consideration is even given within the Quai d'Orsay to the possible registration of the 1955 Treaty.

Libya has drawn attention to this episode, not because the lengthy delay in effecting registration casts doubt upon the validity of the 1955 Treaty or upon the ability of either party to invoke it, but rather because it is illuminating in demonstrating the contemporaneous French attitude towards the boundary provisions of the 1955 Treaty. For, if France had in truth taken the view that Article 3 of the Treaty, read with Annex I, *achieved* the delimitation of the boundary east of Toummo between Libya and what was later to become Chad (and this is what Chad's first theory

requires), then France had every reason to effect rapid registration of the Treaty under Article 102 of the Charter. This was in fact precisely what France did as regards the Exchange of Letters of 26 December 1956. The lengthy delay in effecting registration accordingly testifies to a firm conviction on the part of the French authorities that the 1955 Treaty did not itself fix or determine any of Libya's boundaries with French territory. In other words, it conforms entirely to the pattern of all the other evidence relied upon by Libya to establish that Article 3 of the 1955 Treaty did no more than confirm the territorial status quo as of the critical date.

Mr. President, Members of the Court, you will be relieved to hear that this effectively concludes my presentation. I must apologize to the Court for the discursive nature of my address. But I have had to draw heavily on a wide range of materials and evidence which not only support and sustain the interpretation which Libya puts on the text of Article 3 of the 1955 Treaty but which are also wholly incompatible with the interpretation which Chad seeks to put upon that text. In the end, the Libyan position on the interpretation of Article 3 of the 1955 Treaty can be summarized in the following propositions.

1. Libya relies on the literal meaning of Article 3 — namely, that the two Parties recognize that the boundaries separating Libya from adjoining French territories are those which result from international acts in force on the date of Libya's independence and opposable to Libya or Libya's predecessor in title.

2. Libya regards Article 3 as being declaratory of the boundary status quo as of the critical date, not as being *constitutive* of a boundary in any sector where no such boundary had previously been determined.

3. In the sector between Toummo and the Sudanese frontier, the overwhelming weight of the evidence is that no true boundary dividing the territory of what is now Libya from the territory of what is now Chad had been determined prior to the date of Libyan independence. In particular, no true boundary line opposable to Libya in this sector can be argued to have resulted from the combined effect of the Anglo/French Additional Declaration of 1899, the Franco/Italian Accords of 1900 and 1902 and the Anglo/French Convention of 8 September 1919.

4. The available evidence bearing on the negotiation of Article 3 of the 1955 Treaty amply confirms that no attempt was made to negotiate *de novo* a boundary between Toummo and the Sudanese frontier. Indeed, the available evidence shows that both Libya and France (though for widely differing reasons) were reluctant even to engage in detailed discussions about the legal basis for the alleged conventional boundary in this sector.

5. The context of Article 3 of the 1955 Treaty is wholly consistent with the Libyan interpretation, and is wholly opposed to the Chad interpretation. In particular, the Franco/Libyan Exchange of Letters of 26 December 1956, which must be considered to be part of the "context" of Article 3 of the 1955 Treaty, demonstrates beyond question that the 1955 Treaty did not definitively resolve, and was not intended to resolve, all outstanding boundary issues between Libya and France.

6. The *travaux préparatoires* of the 1955 Treaty and the circumstances of its conclusion again give overwhelming support to the Libyan interpretation of the legal effect of Article 3, read in conjunction with Annex I.

7. Although the language of Article 3, read in conjunction with Annex I, might suggest that the list of *actes internationaux* in Annex I was intended to be *limitative*, Libya is not entirely convinced that this was indeed the common intention of the parties, particularly in the absence of evidence in the *travaux préparatoires* relating to the genesis of the Annex I list and the point of time at which it was included in the text.

8. Libya contends that the expression *actes internationaux en vigueur* used in Article 3 of the 1955 Treaty must be interpreted as referring to international acts actually in force as of the date of Libya's independence, and as *not* including international acts not in force or no longer in force as of that date.

9. Article 3 of the 1955 Treaty, read in conjunction with Annex I, excludes reliance on colonial *effectivités* as an element to be taken into account in the recognition of a boundary pursuant to its terms. But Article 3 and Annex I were concerned only with *conventional* boundaries. The deliberate exclusion by the parties (and particularly by France) of colonial *effectivités* as an element to be taken into account in determining a boundary under Article 3 is in any event indicative of a

complete lack of confidence on the part of France in the validity of any argument, whether on the law or on the facts, that she could have established title to the borderlands on the basis of colonial *effectivités* alone or in conjunction with any of the relevant international acts.

10. The circumstance that France did not register the 1955 Treaty under Article 102 of the United Nations Charter until 1991, while she registered the Franco/Libyan Exchange of Letters of 1956 shortly after its conclusion, confirms the Libyan view that France had no belief, in the years following the conclusion of the 1955 Treaty, that that Treaty *effected* the delimitation of a boundary between Libya and what is now Chad east of Toummo.

11. Mr. President, you will be relieved to hear that this is the final proposition. As a matter of law, the Court would in any event be entitled to take into consideration the circumstance that France may not have acted during the boundary negotiations with Libya in 1955 and 1956 in a manner entirely consistent with the standard of good faith required in the negotiation of treaties and, in the event of the Court's retaining any doubt as to the meaning to be attributed to Article 3 of the 1955 Treaty, to give effect to the principle of good faith by upholding the Libyan interpretation and rejecting the French interpretation now espoused by Chad.

Mr. President, Members of the Court, I thank you for your close attention. I will be followed, tomorrow morning obviously, by Mr. Sohier who will begin by giving a general description of the geography and the inhabitants of the borderlands, and will then proceed to examine the content and the significance of the principal international agreements up to 1912. Thank you.

The PRESIDENT: Thank you, Sir Ian. So, Mr. Sohier, until tomorrow morning at ten o'clock. I am getting a little anxious about the slippage each day so far on the agreed timetable, but no doubt Libya is taking this into consideration in planning the rest of the use of the agreed timetable. So, ten o'clock tomorrow morning. Thank you very much.

The Court rose at 1.00 p.m.

CR 93/16

International Court
of Justice
THE HAGUE

Cour internationale
de Justice
LA HAYE

YEAR 1993

Public sitting

held on Wednesday 16 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 16 juin 1993, à 10 heures , au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Advisers and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Adviser and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Mr. Sohier.

Mr. SOHIER: Thank you, Mr. President. Before I begin, I would like to say what a special honour it is to appear before this Court.

Mr. President, Members of the Court, my task today is to pick up the thread of Libya's argument at the point where Sir Ian Sinclair left off yesterday. He noted that his presentation would be followed by a detailed review of the history of the various *actes internationaux* that might be considered relevant to the existence or non-existence of a conventional boundary between Libya and Chad — whether or not these *actes internationaux* were *en vigueur* on the critical date and whether or not they were listed in Annex I of the 1955 Treaty.

I shall conduct such a review covering the period up until 1912. At the same time as I discuss the *actes internationaux*, I shall review the situation on the ground at the relevant time. The principal focus of my remarks today shall be the 1899 Anglo-French Declaration and the 1900-1902 Franco-Italian Accords.

Because they are relevant to the object and purpose of the international agreements that followed, certain background events, occurring after the 1885 Congress of Berlin, should also be mentioned.

These are:

— The increasingly serious confrontation between Great Britain and France concerning the region of the Upper Nile;

— The hinterland recognized for Egypt and sphere of influence for France in respect of Algiers; and the ensuing Ottoman protest and claim of the hinterland for Tripolitania;

— The French military penetrations aimed at Lake Chad; and

— The delimitation agreements among the major Powers that settled the partition of West Africa.

By the time of the British occupation, in 1882, Egypt had sent military expeditions into Darfour, Bahr al Ghazal and the equatorial regions of Sudan down to the headwaters of the White Nile, extending almost as far south as the Equator. The formed the basis of Egypt's hinterland claim.

The *Khadivate's* claim was challenged by the Islamic leader, known as el-Mahdi. Starting in 1885, el-Mahdi pushed northward and took control over the general area of the Upper Nile — what is now modern Sudan.

Great Britain intervened through the *Khedive*. The Commander-in-Chief of the British army, Lord Kitchener, launched an attack south into Sudan, defeating el-Mahdi at eh battle of Omdurman (near Khartoum) in 1898. He then moved south to Fachoda (at 10° N latitude). These events culminated in the Fachoda crisis in the fall of 1898.

Thus, by the end of 1898, Egypt — then a part of the Ottoman Empire — had established its territorial claim to title as far south as Fachoda, and based on its earlier penetration, even further south. This, then, was the Egyptian hinterland.

The Egyptian hinterland claim had already been recognized a few years earlier by France. For the French Government had protested the 1894 Treaty entered into between Great Britain and the Free State of Congo. That Treaty concerned territorial rights as far south as 5° N latitude and even beyond. France informed Great Britain in a memorandum, signed by the Foreign Minister, M. Hanotaux, of 7 august 1894 that Article 2 of the Treaty infringed the rights of the Sultan and the *Khedive* over the provinces of the Upper Nile. The French Government took the position that the 1894 Treaty was not reconcilable with the firmans, or proclamations, issued by the Sultan concerning or with international agreements guaranteeing the integrity of the Ottoman Empire.

As to Algiers, it had been a province of the Ottoman Empire until its conquest by France in 1830. This came about after an incident involving a slapping in the face of the French Consul. In due course, France sought a hinterland for Algiers south to Lake Chad. It achieved this aim in the 1890 Anglo-French Declaration, in which a French sphere of influence south from the Mediterranean down to the Say-Barroua line was recognized by Great Britain (as is now being illustrated on the screen).

So by 1899, extensive hinterlands south from the Mediterranean had been recognized for both Egypt and Algiers. For purposes of comparison, the area comprising the "Libya-Chad borderlands" had just been placed on the screen. When compared to these hinterlands of Algiers and of Egypt, the

area of the borderlands appears quite modest.

The term "borderlands"is used here by Libya, as well as in its written pleadings, as a handy geographical term of reference. As shown on the screen, it is defined in the north by the 1919 Anglo-French Convention line claimed by Chad, and in the south by 15° N latitude. (It is also No. 1 in the Judge's folder.) I should in this regard mention that the maps appearing in the folder to which I shall refer, or which will be relevant to what I am discussing, start at No. 17 and end at No. 51. As the Judges may have noted, the folder turns this way rather than sideways, which is somewhat helpful for your neighbour. The order of the maps is not necessarily exactly the order in which they come up in the speeches. For example, I have just referred to No. 1.

I should also define another term now, ant that is the term "Sudan", which is used in two senses in Libya's pleadings. It is used to refer, as here, to the region of savannah lying south of the Sahara, roughly south of 15° N latitude. The other sense in which "Sudan" is used is, of course, in referring to the region to the east of the borderlands that was the Anglo-Egyptian Sudan and is now the modern State of Sudan, as you can see on the map.

At about the same time, the French had began to establish themselves in the coastal regions of West Africa around the Senegal river; and French colonial aspirations were forming to extend France's sphere of influence and territorial claims east from the shores of West Africa to Lake Chad, and from there, all the way across Africa to the Upper Nile and the Red Sea.

Turning next to Tripoli, in 1835, the Ottoman Empire expelled the ruling Karamanli dynasty, putting an end to its loose, indirect rule there. This was in part due to the Caliph's alarm over the French conquest of Algiers in 1830. An Ottoman Government was installed in Tripoli, which became a province or *vilayet* under a *Wali* or Governor. The Ottoman administrative structure established in 1835 lasted until the Treaty of Ouchy of 15 October 1912, which required the Ottoman Empire to withdraw from Tripolitania and its hinterland, the borderlands.

The installation by the Caliph of direct control in Tripoli in 1835 was the beginning of the Ottoman moves south into Tripolitania and its hinterland in the face of French military aggression threatening this part of the Ottoman Empire. These Ottoman actions culminated in the establishment

of direct Ottoman administration in the borderlands, beginning in 1908 and lasting until March 1913.

The opportunities for profitable trade made it inevitable that the regencies and protectorates along the Mediterranean coast should look inward from the sea toward the interior and consider these hinterland regions as subject to the sovereignty of the Powers controlling the coasts. This was fostered by the great trade routes running south into the Sudanic regions south of 15° N latitude.

Following the General Act emerging from the 1885 Berlin Conference, giving new impetus to the colonial scramble for Africa, France proceeded to launch a three-pronged advance into the interior of Africa (see map folder No. 17). Lake Chad was the goal:

— From West Africa, the French campaign led by Captain Voulet and Lieutenant Chanoine, which began in 1879, was characterized by its extreme cruelty.

— From the French Congo, the Gentil expedition ran into the powerful forces of Rabbah.

— From Algeria, the Foureau-Lamy Mission (1898-1900) encountered the ferocious resistance of the Tuareg tribes.

The French force converged on Lake Chad in 1900.

After the Porte had asserted direct control over Tripoli in 1835, he began to extend administrative control southward. Posts were established in Gadamès in 1862, in Mourzouk in 1865 and at Ghat in 1875 (Folder No. 18). As the map shows, these oases lay along the main trade routes from Tripoli. At the time, a European traveller into the interior had, first, to obtain a *laissez-passer* from the Governor (or *Wali*) of Tripoli. For the *Wali* maintained virtual control over access to the interior along trade routes. There was a constant north/south flow of commerce along these routes; and the *Wali* — who was the Porte's representative — was in frequent communication with his fellow Muslims in the Sudanic Sultanates. In addition to Islam, the *Wali* and these peoples in the south had in common the Arabic language.

1890 Declaration

This brings me to what is commonly known as the 1890 Anglo-French Declaration. It consisted of declarations exchanged between Great Britain and France. Under them, Great Britain

recognized a French sphere of influence south of its Mediterranean possessions, down to a line drawn between Say, on the River Niger, and Barroua, on Lake Chad. The Declaration also provided for an Anglo-French commission to delimit this line.

Although the Say-Barroua line lay well to the west of what is now the Libya-Chad borderlands, the 1890 Declaration is directly relevant to this case for a number of reasons:

First, in the Declaration, Great Britain *specifically recognized* a French sphere of influence. It brought about a true *delimitation* between a British sphere of influence south of the line and a French sphere recognized to the north. In contrast, as I shall demonstrate shortly, the 1899 Anglo-French Declaration, concerning territory lying north of 15° N latitude, did not.

Second, in 1898, the Say-Barroua line was modified as a result of the work of the Anglo-French commission. It was delimited as a boundary line between France and Great Britain. The conduct of Great Britain and France to proceed at once to establish a treaty a boundary based on the 1890 line was completely different from their conduct in respect to the 1899 Declaration.

A *third* point concerns the geographical location of the Say-Barroua line. The eastern portion of the line lay directly south of Lake Chad, lies directly south of the city of Tripoli. The distance southward from the Mediterranean coast of Algeria, over territory recognized by Great Britain as being within the French zone of influence, was some 2,500 km. This zone covered an immense territory in which at the time France had no presence at all except in areas close to the Algerian coast.

Unlike the Caliph and the *Wali* of Tripoli, the French authorities had virtually no knowledge of the area south of the regions of Ghadamès and Ghat. They had no contact with it or with its peoples. The first French expedition, under Captain Monteuil into the area of Lake Chad only started in 1890; and it originated from West Africa, not Algeria.

And there is a *fourth* point, the 1890 Declaration provoked an immediate Ottoman protest. Of great concern to the Caliph was the fact that this French sphere, recognized by Great Britain, embraced some of the major trade routes from Tripoli south to the Sudan. With its protest, the Caliph described in detail the Tripolitanian hinterland over which he proclaimed Ottoman

sovereignty. The origin of the territorial dispute between Libya and Chad in this case can thus be said to date from the 1890 Declaration and the Ottoman protest it provoked.

The Ottoman protest lodged after the 1890 Declaration was one of several Ottoman protests against Anglo-French agreements that encroached on what the Porte regarded as the Tripolitanian hinterland.

In the Ottoman protest of 1890, delivered by the Ottoman Ambassadors in Paris and London, the Caliph spelled out what he regarded as his territorial rights threatened by the 1890 Declaration. The territory he described as the Tripolitanian hinterland is shown on the map on the screen.

It may be noted that the area over which the Ottoman Empire asserted sovereignty extended all the way south of Cameroon, where German interests were developing. These were to be formally recognized by Great Britain and France in treaties with Germany signed in 1894.

The southward extent from the Mediterranean of the Tripolitanian hinterland claimed by the Porte is not substantially greater than the Algerian hinterland recognized by Great Britain in the 1890 Declaration as France's sphere of influence (some 2,500 km versus some 2,900 km).

The Tripolitanian hinterland claimed by the Porte is less extensive than the Egyptian hinterland claimed by the Ottoman Empire and recognized in 1894 by the French Government (some 2,900 km against 3,100 km) (folder No. 21). So the subsequent French outcry that the Ottoman claim was preposterous in reality reflected the fact that it transgressed on French colonial aspirations. And it will be recalled that French forces, in their penetration of Africa from the west and south, were nowhere near even Lake Chad in 1890. They were not to converge on Lake Chad for another ten years. In contrast, Ottoman administration had been established in the key oases of Tripolitania and the Fezzan; and the *Wali* of Tripoli controlled access to the south along the caravan routes an was in regular communication with the peoples of this hinterland.

There is another difference that I should also bring out here and will be developed later by Professor Crawford and Mr. Maghur, and that is that the French claim was to sphere was of influence whereas the Ottoman Note asserted sovereignty over the area.

Thus the notion that the 1890 Ottoman claim was excessive or unrealistic is inaccurate and

misleading. It had a solid basis. Relative to the Algiers and Egyptian hinterland claims, it was roughly comparable in extent. And by 1911, when delimitation negotiations were foreseen, it had been greatly reduced as a result of a recommendation of the *vilayet* of Tripoli, as shown on the screen. It was this reduced claim that formed the basis of Italy's claim following World War I. This can be seen from Italy's formal 1929 proposal now placed on the screen. The screen actually showed one other programme as well, which was the 1928 minimum programme recommended by the Italian Government (Folder Nos. 56, 57).

The 1898 Anglo-French Convention; the Fachoda Incident.

By 1898, a series of boundary delimitation treaties had started to change radically the map of Africa south 15° N latitude. The resulting boundaries are portrayed on the screen (folder No. 22). These boundaries are not being put in question here; so as far as Libya is concerned, they are established boundaries. They are mentioned only to demonstrate that, when the Colonial Powers intended to delimit boundaries or even spheres of influence, they did so explicitly, they did so in detail, and they did so in international agreements.

— The boundaries to which I just referred extended from the Ivory Coast on the west (French), across the Gold Coast, Togo, Dahomay, Lagos and German Cameroon.

— From the Gulf of Guinea, France and occupied territory that became the French Congo (now the States of Congo and the Central African Republic).

— The boundary between French Congo and Belgian Congo (now the States of Congo and the Central African Republic).

— The boundary between the French Congo and the Belgium Congo (now Zaire), along the Oubangui River, was delimited in 1885 and 1887.

The 1898 Convention filled in certain gaps in these boundaries between French and British territories as far east as Lake Chad, thus completing the partition of West Africa.

This map now on the screen is a composite view of the entire picture up to the 1898 Declaration and it includes as well the Article 2 delimitation under the 1898 Declaration up to 15° N latitude.

I turn now to the crisis that provoked the 1899 Declaration. This was the Fachoda crisis, which almost led to war between Great Britain and France.

As shown once again on the map, by the end of 1898, France had reached agreement with Great Britain over its Algerian hinterland, in spite of the Ottoman protest. A southern boundary of Algeria had been delimitated as far south as approximately 14° N latitude and as far east as Barroua on Lake Chad, that was the delimited boundary. The *Khedivate* of Egypt had encountered more difficulty but had finally driven out of Sudan and Mahdi and in 1898 forces under the command of Lord Kitchener (Egyptian forces) had again moved south as far as Khartoum. In the meantime, a small French force led by Captain Merchand was making its way across Africa from the French Congo to the Nile with the objective of heading off the British in the region of the Upper Nile.

Captain Marchard and his small, exhausted band, reached Fachoda on the White Nile on 10 July 1898 and occupied the small Fort there. He was surprised to find the French flag already flying that had been raised some days earlier by a Russian colonel. Fresh from his victory over the Mahdi at Omdurman, Lord Kitchener steamed up to the Nile with a large force. On 19 September 1898 the famous Kitchener-Marchand meeting at Fachoda took place. (Folder No. 23.) Our screen has the capability of depicting this but we will spare the Court.

I will only mention one thing that happened at the meeting. During it Lord Kitchener made it clear that he represented the *Khedive* of Egypt as well as the Porte and that the Ottoman Empire, through him, was establishing its territorial claim over the region of the Upper Nile.

On 4 November 1898, the French Government ordered with withdrawal of French forces form Fachoda, and the new French Ambassador in London, M. Paul Cambon, approached Lord Salisbury on 12 January 1899 to remind him of the British promise given to his predecessor to examine with France the delimitation of their spheres of action in the region of the Bahr al Gahazal, lying just west of Fachoda. Thus began the three-month negotiations conducted by Lord Salisbury and M. Cambon culminating in the 1899 Anglo-French Declaration of 21 March 1899 that was tagged onto the 1898 Convention.

Before beginning a detailed analysis of the 1899 Declaration, I should like to mention one

matter that came up early in the negotiations and bears directly on the Ottoman hinterland claim.

At the outset of the negotiations, discussion was focused on the region of the Bahr al Ghazal, to the west of Fachoda. It is this region right here that I am pointing to. France's preoccupation was to link together ("grouper" as M. Cambon put it) the French possessions of Congo and Oubangui with its West African possessions and with Algeria and Tunisia. But once this was assured, M. Cambon said to Lord Salisbury: "We can leave for Tripolitania a ceratin hinterland".

It is not surprising that early on in the 1899 Declaration negotiations M. Cambon should say this to Lord Salisbury. Algiers had gotten its hinterland an so had Egypt. And the Porte had already asserted his sovereignty over an extensive Tripolitanian hinterland.

Lord Salisbury replied to M. Cambon: "Yes, we could draw a line in the shape of a horseshoe".

We have drawn on the map a horseshoe-shaped hinterland (folder No. 24). Its southern arc hits 15° N latitude. Of course, this shape could be adjusted to allow for a wider band of French territory to the south, as is being shown on the screen. Its southern arc could hit 16° N latitude or 17° N or even 18°. In 1899, the French, in their three-pronged attack, were only just reaching Lake Chad and had yet to take on the forces of the Rabbah. So it is apparent that quite a sizable hinterland could have been contemplated without interfering with inter-communication between areas where there were French forces on the ground.

I should like now to take a close look at the 1899 Anglo-French Declaration. It is the first, chronologically, of the two essential mainstays of the French-Chadian conventional boundary thesis. The other, 1899 Anglo-French Declaration.

Since the discussion I have just completed bears directly on the Declaration's object and purpose, I shall take that question up first, before turning to the text.

The competing claims of Great Britain, France and Germany in *West Africa* had been settled by 1898 in a series of detailed boundary delimitation treaties. The Anglo-French Convention of 1898 completed these boundary delimitations, but the confrontation between France and Great Britain in East Africa and the Upper Nile, far from being resolved, had reached a dangerous stage.

The 1899 Declaration had one essential purpose: to resolve the crisis over the Upper Nile. It accomplished this purpose by delimiting, to the south of the borderlands, that is south of 15° N latitude, a boundary between French and British territories lying to the east of Lake Chad in such a way as to exclude France from the Upper Nile Basin. In return, the region of the Sudan between Darfour in the east of Lake Chad in such a way as to exclude French. The Court will recall that the area referred to as "the Sudan" is the region of savannah lying south of the Sahara, roughly south of 15° N latitude.

This was a real boundary delimitation, but it only concerned the regions situated between 5° and 15° N latitude. Fachoda lies at about 10° latitude.

The 1899 Declaration had a subsidiary purpose as well — a *negative* purpose. That was to draw a line limiting France's advance to the east toward Egypt in the territory to the north of 15° latitude. Article 2 of the 1899 Declaration dealt with the boundary delimitation south of 15° N latitude; Article 3 accomplished the subsidiary *negative* purpose of the Declaration, north of 15° N latitude.

At the time, in statements made to the Italians in both Rome and London, the British Government made it explicitly clear that Article 3 and Article 3 line had only a negative object. I refer to the Libyan Memorial, paragraph 5.59 for the reference.

That, then, was the 1899 Declaration's object and purpose. Now I turn to examine the terms of the 1899 Declaration, their ordinary meaning within their context and in the light of the Declaration's object and purpose. The text in both English and French has been placed on the screen (folder No. 25).

The opening paragraph indicated that the Declaration was to be added on to Article 4 of the 1898 Convention and become a part of it. In fact, they were subsequently ratified together. I mention this because it brings out the fact that the 1898 Convention formed part of the context of the 1899 Declaration.

In Article 1, there are several things to note:

First, the two Governments undertook in Article 1 not to acquire territory or political

influence to the west and east respectively of a *boundary* line, or as expressed in the English text a *"line of frontier"* (ligne frontière). The line of frontier referred to in Article 1 is then defined in the *next following* paragraph, that is in Article 2. Article 1 makes no reference to the line described in Article 3, only to the Article 2 line.

Second, Article 1, combined with Article 4, made it clear that Article 2, but not Article 3, was intended by the parties to be a *boundary delimitation* between British and French territories. The Court will observe that the term "line of frontier" or *ligne frontière* is used in both Articles. Article 4 provided for the appointment of a boundary commission charged with the task of delimiting on the spot the frontier line in accordance with the indications given in paragraph 2, that is in Article 2. There is no mention of Article 3.

As to the text of Article 2, it defined a "line of frontier" — a boundary line — running from south to north. Its starting point was the boundary between the French Congo and the Belgian Congo, and from there it followed — this is at about 5° N latitude — it followed the line of the water-parting of the watersheds of the Congo River and the Nile north to 11° N latitude, as is shown here on the map. From this point north to 15° N latitude, the boundary line was to be drawn so as to separate the Kingdom of Ouadaï from the Province of Darfour as constituted in 1882. This second part of the boundary by 21° E and 23° E latitude. This is the shaded rectangular area on the screen.

The part of the boundary between 5° and 11° N latitude was relatively easy to determine on the basis of maps showing the parting of the watersheds, but delimiting the boundary between 11° and 15° N latitude was a more complicated task for the boundary commission to undertake. In fact, it was not undertaken by a boundary commission until 1919, some 20 years later.

Coming now to Article 3 of the 1899 Declaration, unlike Article 2, which defined a line running from south to north, the line defined in Article 3 ran in the other direction, from north-west to south-east, starting at the intersection of the Tropic of Cancer and 16° E latitude and descending to the south-east. This was a last-minute shift. Until the last two days of negotiations, the Article 3 line was defined as running south-east/north-west, just as the Article 2 line ran south/north. I shall go into why this shift was made when I return to the *travaux*.

Article 3 starts out with the words, "It is understood, in principle, that . . .". Although the words "in principle" appear twice in Article 2, they modified the direction of the boundary line there. In Article 3, the words "in principle" modified the understanding expressed there rather than the direction of the line.

The understanding expressed in Article 3 was that "to the north of the 15th parallel — that is 15° N latitude — the *French zone* shall be *limited* to the north-east by a line". I would remind the Court that 15° N latitude marked the end of the boundary line described from south to north in Article 2.

Article 3 thus created a *limit* to a French *zone*. the word used is "zone", not "sphere", not "sphere of influence". "Sphere" (or *sphère* in French) was the term consistently used elsewhere in the 1898 Convention. "Zone" (or *zone* in French) cannot be found anywhere else in the Convention or Declaration.

Article 3 did not define the French zone. There is no recognition of any regions as lying within the French zone. There is no mention of a British zone or limit to any British zone. The line is described simply as a *limit* beyond which the French zone was agreed not to extend. Thus, there is in Article 3 no delimitation of spheres of influence — only a line limiting a French zone.

Article 3 then goes on to define this line of *limitation*. The Article 3 line was a start from a specifically identified point (the Tropic of Cancer — 16° E longitude) and descend from there "to the south-east" until it met 24° E longitude. The line was then to follow 24° E until it met, "to the north of 15° N latitude", the frontier of Darfour "as it shall eventually be fixed".

This brings out two things:

First, the starting point of the line was not linked to any other boundary. There is no mention, for example, of a Tripolitanian boundary — in fact, the names Tripolitania or Tripoli are entirely mission from the Declaration.

The *second* points that the end-point of the Article 3 south-east-descending line was not specified as coinciding with the end-point of the north-ascending Article 2 line at 15° N latitude. yet intended to meet at the same point. Why was this so?

The answer is that the Article 2 line had no specific end-point to refer to — where the north-ascending lines intersected 15° N latitude — since, between 21° and 23° E longitude, that boundary line had yet to be delimited with precision. Only the principle had been agreed as to the course of the line — to divide Ouadaï form Darfour — and that was not such a simple task. For one thing, the two maps being used by Great Britain and France — a German map of 1892 and a French army map of 1896 — produced different results. Paradoxically, the French wanter to use the German map and the British and French map. This, incidentally, illustrates the fact that the maps being consulted at the time reflected an incomplete knowledge of the geography of the region.

This inability to agree on a map for defining the Article 2 sector was one of the reasons that no map was referred to or annexed to the 1899 Declaration. Another reason was that, if a map were annexed, France feared it would imply French acceptance of the British occupation of Egypt. It is important to note that it was France that insisted that a map not be referred to in, or annexed to, the Declaration. And certainly a map would quickly have aroused the attention of the Ottoman Empire.

I mentioned that there was no precise end-point to the Article 2 line. This explains why, in the last several days of negotiation, the definition of the Article 3 line, until then described as running from south to north, like the Article 2 line, was shifted to a line running instead for north to south — or more accurately, from north-west to south-east. For it is axiomatic that in order to draw a line a starting-point must be known. If the exact end-point is not known, then the line can be described by giving its direction together with a formula to deal with the uncertainties as to the ultimate end-point. This is exactly what Article 3 accomplished.

What was the intend direction of the Article 3 line? The terms of Article 3 answer this question: the line was to run "to the south-east" — *"dans la direction du sud-est"* — not to the east-southeast, not southeastward, and not in a southeasterly direction — "to the south-east". As I have just explained, the Article 3 line could not have been defined at the time as a straight line drawn to the point of intersection of 24° E and 15° N, because the Article 2 sector line, which was to divide Ouadaï from Darfour, was not necessarily going to end at the precise point. So, instead, Article 3 specified a south-east line to be drawn to the point where this line intersected 24° E longitude. From

there, it was to continue south also in the line of longitude and end at the meeting point of 24° E and the frontier of Darfour "as it shall eventually by fixed". This point, too, was not known.

The negotiators of the 1899 Declaration had in front of them the two maps that I just mentioned. In fact, there is no disagreement between the Parties, and in fact Chad has placed in evidence excellency copies of these maps, which Libya is using for this analysis.

However, there is a critical difference of view between Libya and Chad over the intended direction of the line defined in Article 3. Chad says the Article is vague and unclear, and it resorts to the *travaux* to attempt to demonstrate that the line defined as running "to the south-east" actually was intended to run to the east-southeast. Libya considers that Article 3 is clear concerning the direction of the line. It was to run "to the south-east". The text is neither ambiguous nor obscure.

I should like to demonstrate now what I have just said concerning the intended direction of the Article 3 line on a reproduction of one of the two maps that lay in front of the negotiators in 1899 — the French Army of 1896.

Now the terms of Article 3 are that the line shall start at the point of intersection of the Tropic of Cancer and 16° E longitude. The line shall run thence to the south-east until it meets 24° E longitude. Such a line is shown on the screen. The Court will note that the point of intersection of this line and 24° E longitude is north of 15° N latitude and also north of the notional frontier of Darfour shown on the French Army map, thus perfectly matching the text of Article 3 (folder Nos. 26, 27).

The text of Article 3 provides that the line shall then follow 24° E until it meets, to the north of 15° N latitude, the frontier of Darfour as it shall eventually be fixed. As the Court can see, the line on the screen has done that as closely as possible. It has descended south along 24° E longitude until it intersected the Darfour boundary. A strict south-east line drawn on this map therefore perfectly matches the ordinary meaning of the terms of Article 3.

What emerges from this analysis is that the negotiators of the 1899 Declaration came up with a rather clever solution of the dilemma of not knowing exactly where to end the Article 3 line. They found that a strict south-east line would intersect 24° E longitude just north of where the maps

showed the national Darfour frontier to lie. This gave them a precise end-point to the Article 3 south-east line, and one that would be fairly close to the ultimate end-point to the Article 2 line, after it had been delimited in detail, which it was logical to assume would also coincide with the northern boundary of Darfour.

The *context* of Article 3 supports Libya's interpretation as to the intended direction of the Article 3 line. The expressions "to the west" and "to the east" appear in Article 2 of the 1899 Declaration' "to the north", "to the east" and "to the north-east" appear in Article 3. the words are clearly intended to mean precisely what they say: they point to a precise direction, just as "to the south-east" does.

As earlier noted, the 1899 Declaration was added on to Article 4 of the 1898 Convention. So the Convention forms part of Article 3's context. The text of the Convention is full of references to directions.

When the direction was intended to be generally, but not precisely, described, the term "northward" *(vers le nord)* or "eastward" *(vers l'est)* appears. For example, in Article 1 of the Convention, the line there is described as following the thalweg of a river wanders northward; it does not follow a true north direction.

The terms "northward" and "eastward" are also used to describe the direction of the line when it follows a line of longitude or latitude, for such a case the precise direction of the line is predetermined by the line of longitude "eastward". This could only mean true east or due east. I its interesting to note here that the French phrase used to describe this true east line is *dans la direction de l'est*. The Court will recall that the French text of the description of the Article 3 line in the 1899 Declaration uses the same form of words, *dans la direciton du nud-est*.

Elsewhere in the Convention appears such a phrase as "in a northerly direction", one again sees that the line appears to run more north-northeast than true north. And elsewhere, one finds directions such as "due north" and "due south", as in Article 4. But it has not been customary practice in geographical terminology to use the adjective "due" except in conjunction with the principle directions of north, south, east and west.

Perhaps I can now summarize what Libya considers to be the ordinary meaning of the terms of Article 3 of the 1899 Declaration in their context, and in the light of their object and purpose.

First, as to the *nature* of the Article 3 line, it cannot be interpreted as a *boundary line*. Chad concedes this point. The 1899 Declaration provides for no boundary north of 15° N latitude. the corollary of this agreed position is that for the Article 3 line to become a boundary line would require an explicit amendment by the parties to the Declaration so as to provide for this change in the nature of the Article 3 line. And Chad appears not to accept this proposition, contending that the Article 3 line as a result of alleged French *effectivités* was transformed into a boundary.

Sir Ian Sinclair has already dealt with Chad's contention in the context of the 1955 Treaty. Professor Bowett will deal with it further when he examines Chad's claim to title based on French *effectivités*. On both legal and factual grounds this contention of Chad must be rejected. It is important to bear in mind that this was an argument never advanced by France.

The *Second* conclusion to be drawn from the ordinary meaning of Article 3, again concerning the *nature* of the Article 3 line, is that it was a line of *limitation* to a French zone. Article 3 contained no definition or recognition of either a French or a British sphere of influence on either side of the line. It is axiomatic that a line cannot be a line of delimitation of spheres of influence if no such spheres of influence are recognized or defined.

Once again, therefore, for the nature of the Article 3 line to change so as to be a line of delimitation of spheres of influence would require an explicit amendment of Article 3 so as to recognize and define which spheres and to determine the line and to describe the line as delimiting these spheres.

The *third* conclusion concerns the intended direction of the Article 3 line. I will not repeat now the conclusion of this. Libya considers the text to be perfectly clear — "to the south-east" and that a true south-east line perfectly bears out the intent of the text of Article 3. I should pause here perhaps to explain why the direction of the line is such an important matter in this case.

As Sir Ian Sinclair pointed out, Chad's three theories all lead to the exact same line. It is fundamental to Chad's case, in order to reach such a conclusion, as well as to Chad's argument that

Chad's claimed line was opposable to Italy, that Chad establish that the line described in Article 3 of the 1899 Declaration was virtually the same line as the line shown on the *Livre jaune* map published by the French Government in 1899, and as the 1899 line was modified by the so-called "interpretation" set out in the 1919 Anglo-French Convention. If the intended direction of the 1899 line was strict south-east then Chad cannot establish either proposition, for the *Livre jaune* line and the 1919 line followed a quite different direction — east southeast. Of course, even those two east-southeast lines were appreciable different, one from the other.

Let me remind the Court of the difference between these lines. Each line, now on the screen, follows a quite different direction. But the difference between a strict south-east line and the other two lines is the more striking. One does not need, as Chad has suggested, a magnifying glass or even a strong pair of glasses to see the difference in the directions taken by these lines (folder No. 28).

The importance of this point was not lost on the French Government, for it was an essential element of the French thesis as to a southern boundary of Libya that the 1919 Convention did not materially alter the direction of the 1899 line. That would explain why the French Government — contrary to fact — consistently described the *Livre jaune* map as having been annexed to the 1899 Declaration. For the difference between the *Livre jaune* map line and the 1919 line arguably could be explained away as minimal — and the French Government attempted to do so. Of course, even this is not so, as the lines on this screen reveal.

In disputing Libya's position as to the direction of the Article 3 line, Chad has relied on certain documents of the British Sudan Service in Khartoum prepared many years later — in 1919 and in 1923. They are hardly what could properly be called *travaux* of the 1899 Declaration. Chad also relies on Sudan Service documents to argue that to interpret the Article 3 line as describing as a strict south-east line would lead to an absurd and unreasonable result.

There is a full discussion in Libya's Counter-Memorial (starting at para. 4.182) of these documents produced with Chad's Memorial and of Chad's arguments based on them. However, Chad has with its Reply added some Sudan Service documents, without either discussing the evidence in its Reply or formulating the propositions that Chad would derive from them.

But I will deal here with one of Chad's arguments. This is that a strict south-east line would have led to a manifestly absurd and unreasonable result. A 1919 analysis by the same British Sudan Service said that a strict south-east line would be "ridiculous" because such a line would, it was argued, be inconsistent with the object and purpose of the 1899 Declaration. That was, the argument continued, to recognize the regions of Borkou, Tibesti and Ennedi and falling within the French sphere of influence.

This conclusion was wrong on several counts. I have already demonstrated that no such recognition or definition of a French sphere of influence emerges from the text of Article 3. All the evidence points to the fact that Great Britain refused to recognize or identify a French sphere of influence north of 15° N latitude, just as France refused to recognize a British sphere. The object and purpose of Article 3 was to establish a line placing a limit to France's potential expansion eastward in the direction of Egypt and the Nile — a limit to a French zone — not to recognize and define spheres of influence.

The *travaux* reveal that for a time, in the drafts to Article 3 exchanged between the parties, the line was described in terms of the regions to be left on the French side of the line. This was abandoned in the end. Any mention of regions was omitted from Article 3, and the present text, provided for a line running "to the south-east" from the designated starting point on the Tropic of Cancer, was substituted. Why this was done was explained by Mr. Cambon in his despatch to French Foreign Minister Delcassé on 20 March 1899 — one day before signature. Here is Mr. Cambon's explanation:

> "It must not be forgotten that we are exposed to the claims of the Sultan and to the suspicions of Italy. A provision, precise enough to assure for us incontestably the regions between the south of Tripolitania and Darfour, and vague enough to allow us to decline any conversation with the Porte, seems to me preferable to an enunciation or mention of any territory." (ML, French Archives Ann., p. 44.)

Well, Chad would argue, echoing the Sudan Service's comments in 1919, that is precisely the point — a strict south-east line would not have left these regions, no longer identified in the text, on the French side of the line. Of course, the short answer to that is whether the line had this result or not is immaterial. The parties had agreed on a new form of words for describing the line in Article 3

of these included a clear indication of the direction of the line — "to the south-east" — not to the east-southeast or some other direction.

But even were this point conceded for purpose of the argument, which it is not, the Sudan Service and Chad are still wrong, for they were looking at 1919-vintage maps rather than at 1899-vintage maps. A strict south-east line drawn on the German and French maps consulted by the negotiators in 1899 would have left on the French side of the line virtually all these regions. I invite the Court to inspect Nos. 26 and 27 in their folder at their leisure. This same point is now demonstrated on the screen.

Since this point has been so fully discussed and illustrated in Libya's Counter-Memorial, starting at paragraph 4.71 and various maps there, I will not go further into this demonstration.

I will, however, continue a little bit further into the *travaux*.

Following the exchange of a number of drafts after the start of negotiations in January 1899, the French tabled, on 9 March, a new draft of the Declaration. The course of the line described in Article 3 of the French draft was to start at 14° N latitude and to be drawn to the north so as to pass to the east of the mountains forming the regions of Soghaous, Ennedi, and so on, so the regions were mentioned in this draft. The line was to be so drawn so as to leave also in the French sphere — in this draft was "sphere" and not "zone" — a belt of sand at least 10 miles from the foot of the mountainous *massif* forming these regions. So the draft used the word "sphere", defined the regions falling within this "sphere", then it added a 10-mile zone of sand north of the *massif*. These directions are so unclear that it would not be possible to put on a map the proposed French line.

Lord Sanderson passed the French draft on to Lord Everett in the War Office for his review and comments. He also formulated his own detailed critique and sent it to Lord Salisbury, rejecting out of hand the draft of Article 3 prepared by the French. One of Lord Sanderson's comments on the French draft of 9 March is of particular relevance in confirming the object and purpose of Article 3. He said he found the French revision of this Article objectionable because:

> "It contains a recognition that certain places fall within this sphere, whereas we do not wish to go farther than renounce any claim to them ourselves." (ML, British Archives Ann., p. 4.)

As we have seen, the British position prevailed in the final text, which contained no recognition or definition of a French sphere.

On 19 March, a draft was presented by Lord Salisbury. Its Article 2 and Article 3 lines are now displayed on the screen (folder No. 29). This draft and M. Cambon's reaction to it constituted a pivotal moment in the negotiations. Chad's Counter-Memorial has referred to it as "cet épisode crucial".

What the British draft did was to extended the Article 2 *boundary line* to 18° N. From there another line, the Article 3 line, was to be drawn to the point of intersection of the Tropic of Cancer and 16° N latitude. This line trended west-northwest-/east-southeast. It was described in the draft as following a "north-westerly direction", not "to the north-west" — for Lord Salisbury knew full well the line was not a strict north-west line: it trended west-northwest/east-southeast.

The British 19 March draft was the first draft in which the point of intersection at the Tropic of Cancer appeared. The end-point of the Article 2 line continued to coincide with the starting point of the Article 3 line. The line also continued to be described as running generally from south to north.

M. Cambon's immediate reaction, as reported to M. Delcassé, was that it was impossible to *push* the delimitation up to 18° N latitude ("pousser la délimitation jusqu'au 18° parallèle"). From the negotiations that had preceded, it is clear that what M. Cambon meant was that the end of the Article 2 boundary line, which had in the prior drafts been the starting point of the Article 3 line, ought not to be pushed north of where it consistently had remained during the negotiations — at 15° N latitude or even further south.

As the handwritten draft table by Lord Salisbury on 19 March shows, Lord Salisbury accepted M. Cambon's objection. the figure 18° N was crossed out and 15° N substituted for it, as the close-up on the screen reveals (folder No. 30). The effect of Lord Salisbury's modification to his proposal is now shown on the screen. The line is now shifted — his first proposal is the top line, his modified proposal is the bottom line.

It was at this stage, two days before signature, that several other last-minute changes in

Article 3 were made. Lord Salisbury's 19 March draft, to which I have just referred, had finally picked an end-point of the line — still describing from south to north — on which agreement could be reached. This was compromise between the British proposal to end the line at Toummo and the French proposal to end it considerably further to the north-east of Toummo. This compromise end-point was the intersection of 16° E longitude and the Tropic of Cancer. The starting point of the Article 3 line still running from south to north that Lord Salisbury agreed to, after M. Cambon objected to pushing the line north 18° N latitude at the point of intersection of the Article 2 boundary.

But there is a problem with that point. It could not then be identified since the part of the Article 2 boundary between 11° and 15° N latitude had not been fixed in Article 2 — although the principle had been agreed. I have discussed this problem already.

After what M. Cambon described as a "rather long discussion", the direction of the line as described in Article 3 was reversed: instead of ascending in a "north-westerly direction" under the first draft of Lord Salisbury, it was to descend "to the south-east". This shift is not explained in the *travaux*, but the reason is self-evident. Only one end of the line could be fixed at the time — the northern end — for Lord Salisbury's starting point for the line at 18° had been rejected, leaving a point to be fixed later along the line of 15° N latitude, a point not then known. So the only possible starting point of the line was the known. So the only possible starting point of the line was the known and agreed point on the Tropic of Cancer. Thus, the description of the direction of the Article 3 line was reversed.

At this point, agreement was near. The French, however, still refused to accept the reciprocal clause in the British draft prescribing that each party could not go beyond the line. M. Delcassé feared it implied an indirect recognition of English rights over the Middle and Upper Nile, as M. Cambon put it. On their side, the British did not want to define or recognize a French sphere of influence to the west of the line. What resulted was another rather clever compromise to resolve the impasse. The idea of reciprocity was abandoned, and the description in the text of the line was changed so as to be expressed as a limit to the French zone. The words "sphere" or "sphere of

influence", which consistently appeared elsewhere int he 1898 Convention, as well as in earlier drafts of the Declaration, were removed, and hence any possible implication of British recognition of a French sphere of influence. From the French standpoint, a limitation imposed on the "French zone" raised no implication of a British presence on the other side of the line.

The *travaux*, therefore, confirm that, north of 15° N latitude, the 1899 Declaration did not purport to establish a boundary or delimitation of any kind. Article 3 merely described a south-east line as the limit to the French zone. This zone was intentionally not defined or recognized in a positive zone. This zone was intentionally not defined or recognized in a positive sense in the Declaration.

Now the Court will note that the south-east line described in Article 3 extended from the Tropic of Cancer, not to 23° E, but to 24° E longitude, from where it then descended due south to the Derfour frontier. Since the Article 2 boundary still to be precisely delimited was to extend no further east than 23° E, a gap would inevitably result between the end point of the Article 3 *line* and the Article 2 *boundary*. And this is shown on the screen (folder No. 29). This gap came about because the British refused to agree to French demands to extend the Article 2 sector eastward. This gap was not dealt with until the 1919 Anglo-French Convention.

I have come to the end of my remarks concerning the 1899 Declaration. Before moving on, I should like to pause in order to show, by way of summary, on what I shall refer to as the *boundaries* map, the conventional boundaries of any relevance to this case, as to the end of 1899.

First, we see on the screen the 18902 S Syay-Barroua sphere of influence line, delimited as a boundary in 1898. Of course, it was not opposable to Italy or to the Ottoman Empire, which protested it. It also concerned areas outside the Libya-Chad borderlands. But it was a boundary having a certain relevance to this case, as I have explained, so, I leave it on the map.

Second, there is added to the map the boundary delimitation under Article 2 of the of the 1899 Declaration as far north as 15° N latitude. The strict south-east line of Article 3 is being placed on the map, but it is being removed. It certainly was not a boundary in 1899, a fact that Chad has conceded. In fact, it was not a delimitation of any kind.

Third, a boundary was agreed between Great Britain and Egypt in the Butros Ghali-Cromer Arrangement of 19 January 1899 (this is in Chad's Production 250). It established a boundary between Anglo-Egyptian Sudan and the *Khedivatei* of Egypt along 22° N latitude. This line will remain on the boundary, for it was a real territorial boundary, and it has a certain relevance to this case, as will be seen later.

Thus, as of the end of 1899, the lines appearing on the map on the screen were the only boundaries having any relevance to this case.

Mr. President, this has perhaps been hard work for the Court, and this might be a convenient moment to take our break.

Mr. PRESIDENT: Thank you very much, Mr. Sohier. We will do that now, thank you.

The Court adjourned from 11.15 to 11.35 a.m.IDENT: Please be seated

Mr. Sohier.

Mr. Sohier:

Conduct Subsequent to the 1899 Declaration

Certain conduct, Mr. President, Members of the Court, following the 1899 Declaration is relevant and of importance. Much as this has been fully discussed in Libya's Pleadings.

First, there was the Ottoman protest against the 1899 Declaration, and interestingly Germany sent a note verbale to Great Britain noting that the 1899 Declaration was res inter alios acta. The most significant action by the two signatories to the Declaration, Great Britain and France, was the issuance shortly after the Declaration was signed of a French *Livre jaune* publication of the 1899 Declaration to which was attached a map.

As the Court well knows there was no map attached to the 1899 Declaration. France had opposed the attaching of a map and no map is referred to. In contrast, with respect to the 1898 Convention, maps were referred to and annexed.

I will not go into the analysis of the *Livre jaune* map which has been done fully in Libya's

written pleadings. And, I will not go into any detail of the British reaction to the *Livre jaune* map except to remind the Court of the reaction of Lord Sanderson in a note to Lord Salisbury in which he noted that:

> "The French have drawn the line from the Tropic of Cancer to east-southeast instead of south-east.
>
> I do not know that it matters much.
>
> Otherwise this line seems fair." (ML, British Archives, Annex, p. 37.)

The word "otherwise" is rather important, which suggests that the direction of the line is not fair, is incorrect. Now, I will not develop this further because this has been extensively dealt with in the pleadings of Libya.

However, there is another element of conduct by Great Britain that is extremely important and which I can cover very quickly by showing the maps. This was that after the 1899 Declaration and after having seen the *Livre jaune* map put out by the French, which was really not much more than a sketch-map, the British War Office issued a number of maps and I should like to put them up.

First, there was the 1916 British War Office map; it shows a strick south-east line (folder No. 32).

Then there was a 1906 British War Office map revised to August 1913; it shows a strict south-east line (folder No. 33).

Then there was a 1914 British War Office map. Again, a strict south-east line (folder 34).

It is quite remarkable that not one of these maps appeared among the 162 maps in Chad's map Folder.

However, in Annex 177 to Chad's Reply, a number of official maps issued following the signing of the 1899 Declaration were placed in evidence by Chad.

They put in evidence the 1914 War Office map that resembles the 1916 map furnished with Libya's Memorial. They also attached successive editions, 1921, 1928 and 1934. But it is the 1914 one that is interesting, because in 1919, of course, Great Britain agreed to a change in direction of the line. What they considered the direction of the line in 1914 is what is interesting — a strict south-east line. The pink scores along the line were superimposed by Chad in their Map Atlas

(folder No. 35).

Then in their Reply, Chad produced another 1914 War Office map. (folder No. 36). This is the same one that Libya has furnished. Again, a strict south-east line.

So, this group of nine British maps furnished by Chad shows, as the Article 3 line, a strict south-east line on the editions of the maps issued prior to 1919, the British War Office maps.

There is another British map of importance — one issued in 1899, shortly after the signing of the 1899 Declaration — I think that is a very important point — by the Royal Geographical Society. It was just after the signing of the Declaration. It, too, shows a strict south-est line (folder No. 37).

The important point is that, seemingly with but one exception, that Chad has put into the record, all the pre-1919 British maps placed in evidence by Libya and Chad show a strict south-east line for Article 3. The exception is a 1909 edition of the 1904 map issued by the Sudan Service. So, Libya will postpone any discussion of this map and other evidence in the form of documents form the Sudan Service until Libya hears what Chad has to say about this map.

1900-1902 Accords

I come now to the second mainstay of the French-Chadian conventional boundary thesis: the 1900-1902 Accords. An important part of the heavy burden Chad expects these Accords to bear is to provide the basis for making opposable to Italy (and hence to Libya) the 1899 Declaration and the so-called "interpretation" of it in the 1919 Anglo-French Convention. It would seem reasonably clear that even under such a theory of opposability, whatever, arguably, became opposable to Italy in 1902 could not have been other than what was binding on Great Britain at the time. As I have just finished demonstrating, this did not include a conventional boundary north of 15° N latitude between Libya and any French territories, or, in fact, any delimitation at all, even of spheres of influence.

These Accords consisted of the 1900 and 1902 Franco-Italian Accords and the 1902 Anglo-Italian Accords. They were all secret agreements. The Franco-Italian Accords did not become publicly known until about 1919, and their texts were not first published by the French Government until 1920. As a result, for many years, these texts did not receive the public scrutiny

usually given to published treaties and international agreements. Hence, it was easier to invent myths as to their meaning and effect. And this is exactly what happened in the case of the Franco-Italian Accords.

The 1900-1902 Franco-Italian Accords are an essential element of Chad's contention that in 1951, when Libya attained independence, there was a convention al boundary between Libya and France. These Accords had also been the crux of France's earlier thesis as to a Libyan boundary. In fact, in June 1955, when the second stage of the negotiation leading to the 1955 Treaty was about to start, the French informed the British Foreign Office, in the court of seeking British support, that the 1902 Accord was the *"texte de base"* of the French position and, of course, it is in connection with the 1902 Accord that the famous *Livre jaune* map gained such prominence and has acquired such an important role in Chad's case.

I begin with the 1900 Franco-Italian Accord, to take up again first its object and purpose. This principally concerned France's interests in Morocco. The 1900 Accord recognized Italy's right to develop its interests in Tripolitania in exchange for France's freedom of action in Morocco. The 1900 Accord was the first of a number of agreements entered into by France with other Powers in order to gain recognition of France's special status in Morocco.

France's special status in Tunisia is also part of the background of these Accords. For when France, in 1881, established by treaty its protectorate over Tunisia, there was a serious falling out with Italy. In 1882, Italy proceeded to join the Triple Alliance with Germany and Austria. Reconciliation between France and Italy came in 1896, when concessions concerning Tunisia were made to Italy, set forth in three treaties of that year. Thus, a subsidiary purpose of the 1900 Accord was to make Italy less dependant on the Triple Alliance in maintaining the status quo in the Mediterranean. At this point, another factor entered the picture — the 1899 Anglo-French Declaration. For the Declaration had made no mention of Tripolitania, and Italy approached Great Britain and France to ascertain what it meant in regard to Tripolitania.

So with Italy seeking assurances concerning the 1899 Declaration, and France seeking Italian recognition of its status in Morocco, discussions got under way. They were not easy, they lasted for

a year and a half, and in the end, the results were not reciprocal, but favoured France.

This leads me to the form and the text of the 1900 Accord and its ordinary meaning. As to form, the Accord consisted of a letter from French Ambassador Barrère to Italian Foreign Minister Visconti-Venosta containing a unilateral declaration regarding the 1899 Declaration; and a letter dated two days later form Signor Visconti-Venosta to M. Barrère concerning recognition of the freedom of action of France and Italy in Morocco and Tripolitania, respectively. These letters the Judges can see on the screen side by side (folder No. 38). Each letter dealt with an entirely different subject. Neither letter referred to the other. Neither France nor Italy acknowledged the undertakings made by the other, an this form was largely dictated by Italy's concern that the Accord, even though secret, should not be seen as in conflict with its Triple Alliance undertakings and relationship. This was a matter with the Italian King felt particularly strongly about.

It is M. Barrère's letter that is directly relevant. The first two paragraphs — which appear on the screen, first in French, and then in English translation — explain the letter's background and refer to earlier clarifications given to Italy by the French Government concerning the effect of the 1899 Declaration. This letter was intended to make these earlier assurances more explicit.

Then in the key third paragraph, the French Ambassador explains that the 1899 Declaration, in omitted any mention of the *vilayet* of Tripoli, established a *limit* for the French sphere of influence, in relation to Tripolitania — Cyrenaica, which the French Government had no intention to exceed. M. Barrère added that France had no plans to intercept the caravan traffic from Tripoli into the interior.

I should point out that, because the Court will have noted, I said "limit", and the word underlined on the screen is "boundary". Libya takes issue, with great apologies, with the translation of this word by the Registry. So we have substituted in our translation the word "limit" for "boundary". In the context, "limit" is clearly the correct word, as will emerge in the discussion that follows.

The *travaux* reveal the clause "by its exclusion of the *vilayet* of Tripoli from the partition of influence for which it provides" was inserted at Italy's request. By adding this clause, it was made

clear that the omission from the 1899 Declaration of any reference to Tripoli meant that it was excluded form the effects of the Declaration.

It is not surprising that the text of this paragraph soon led to a request for further clarification: it is not a model of clarity. When the British were shown this letter in 1902 they reached the same conclusion.

As to the French declaration concerning caravan routes, it is to be noted that only the western caravan routes to and from Tripoli were mentioned — not the eastern routes from Benghaze to Ouadai. Both these routes are now shown on the map on the screen (folder No. 40).

I come now to the second letter making up the 1900 Accord — the letter from Italy's Foreign Minister. Its first three paragraphs endorse the exercise of French rights in Morocco, but the rights of Italy in respect of Tripolitania set out in the fourth paragraph are not nearly as broad as France's rights in Morocco. Italy's right to develop its influence in Tripolitania-Cyrenaica would arise only if there were a change in the political or territorial status of Morocco. So it was not entirely reciprocal.

There then occurred an event that has a direct bearing on the meaning intended to be given to M. Barrère's declaration in his letter to Signor Visconti-Venosta. Signor Prinetti had been named Italian Foreign Minister to succeed Signor Visconti-Venosta shortly after signature of the 1900 Accord. He felt under political pressure to make some sort of public statement concerning the contents of the Accord without compromising its secrecy. This was a delicate matter. For, aside from the Triple Alliance, any indication of assurances given to Italy regarding Tripolitania was certain to provoke a protest from the Porte. Tripolitania was, after all, still a part of the Ottoman Empire.

It was agreed between Italy and France that Signor Prinetti would summarize the gist of M. Barrère's letter in a statement to the Italian Parliament. The relevant part of the text of this speech — delivered on 14 December 1901 — which has now been placed on the screen — was agreed word for word between the two Governments before the speech was given. And Signor Prinetti stuck to the agreed text (folder No. 39).

Thus, the agreed text of this speech falls within the context of the 1900 Accord within the

meaning of Article 31, paragraph 3, of the 1969 Vienna Convention. It was, to quote from that provision, a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

It is the third paragraph of his speech that is relevant and is now on the screen. There Signor Prinetti said that the French Government had taken care to inform Italy that the 1899 Declaration marked for France, in relation to the countries and regions boarding on the eastern frontier of France's African possessions (in particular with respect to the *vilayet* of Tripoli), a limit that it did not have the intention to overstep. The Court will note the word in translation is "limit" not "boundary". He also mentioned the French commitment not to cut the caravan routes from Tripolitania into Central Africa.

This sentence identifies the geographical area at which M. Barrère's declaration was aimed. This area consisted of the countries and regions, including in particular the *vilayet* of Tripoli, bordering on the eastern frontier of France's African possessions. (On the map, France's possessions are coloured in blue, in the upper left.) Thus, the speech as being France's African possessions, to the east of which lay the *vilayet* of Tripoli.

The map has on it the wavy, dashed line around Tripolitania that is taken from the *Livre jaune* map and originally to be found in the 1899 German map.

The blue shading at the bottom of the map shows approximately where French troops, in their three-pronged attack, had reached by 1900, at Lake Chad. As I mentioned before, the French possessions at the time are shown in light blue, on the upper left. It will also be recalled that a French sphere of influence had been recognized by Great Britain down to the Say-Barroua line in 1890. That line had been delimited in 1898. However, the French *possessions* boarding Tripolitania that are referred to be Signor Prinetti could only have been the eastern regions of Tunisia and Algeria, south to about the region of Djanet and Gat.

For French forces had penetrated no further south than there at the time except for one of the three prongs of the French advance on Lake Chad, the Foureau-Lamy Mission, which came south form Algeria but followed a route to the west of the borderlands claimed by the Ottoman Empire.

The strict south-east line of Article 3 of the 1899 Declaration has been placed on the map. It is obvious that this line had nothing to do with the limit to French expansion that Signor Prinetti described in his speech, and which had been agreed word for word with the French. The caravan routes also referred to by him ran from Tripoli to the south. These were the western caravan routes that now appear on the screen. There was no mention of the eastern caravan routes running south from Cyrenaica.

This leads to the 1902 Franco-Italian Accord. Italy was not wholly satisfied with the 1900 Accord. It was not reciprocal — it was not clear precisely what was meant by the eastern frontier with Tripolitania. No such frontier had ever been conventionally defined.

Italy in the meantime was pressing both France and Great Britain for a more specific token of recognition as heir apparent to Tripolitania, and neither France nor Great Britain were willing to go that far.

In form, the 1902 Franco-Italian Accord was a bilateral undertaking. It consisted of an exchange of letters between Signor Prinetti and M. Barrère, and the letter containing almost identical texts. And it, too, was secret.

The French texts of the two letters have been placed side by side (folder No. 41). Taking up, first the initial paragraph of the 1902 Accord, which now appears on the screen in English, the stated purpose of the Accord was to make more precise the commitments resulting from the 1900 Accord so that each of the two Powers might freely develop its sphere of influence in what is referred to as the "aforesaid" regions, without the action of one being subordinated to that of the other. The "aforesaid" regions, as the paragraph clearly shows, were Morocco as to France, Tripolitania as to Italy.

The effect of this paragraph was to correct the imbalance of the 1900 Accord in which, it will be recalled, Italy's right to develop its sphere of influence was made conditional upon a change int he situation in Morocco. But giving Italy the freedom to develop a sphere of influence at the opportune moment was not the same thing as recognizing an Italian sphere of influence. Tripolitania was under Ottoman sovereignty in 1902. France could not have recognized an Italian sphere of influence there,

as Chad now claims. At most, Italy had future expectations in the event Ottoman sovereignty over Tripolitania should cease. France recognized Italy's freedom to develop its sphere of influence there in such an eventuality. Contrary to what Chad contends, France recognized in the 1902 Accord no Italian sphere of influence in Tripolitania; and Italy recognized no French sphere of influence except in Morocco.

Turning to the second paragraph, its apparent intent was to clarify the meaning of the third paragraph of M. Barrère's 1900 declaration. These two paragraphs — one from the 1900 letter, which is on the top, the other from the 1902 letter, which is on the bottom — have been placed, one above the other, on the screen. The matter to be cleared up was just where the line was to be drawn limiting French expansion to the east of its Algerian and Tunisian possessions, for Tripolitania had no conventional boundary. This, incidentally, was a conclusion arrived at by the British Foreign Office and the Italian military staff, and I refer the Court to paragraphs 5.93-5.95 of Libya's Memorial. Nevertheless, some sort of line was needed to define the French limits.

The second paragraph of the 1902 Barrère letter starts off by recalling recent conversations between M. Barrère and Signor Prinetti, certain conversations that are referred to in the letter of 1900. That was the part of the 1900 letter that needed to be made more precise. M. Barrère then proceeds to define this limit by reference to the frontier of Tripolitania indicated on the map annexed to the 1899 Declaration.

Of course, there was no such map. The *travaux* reveal that this entire sentence had been added at Signor Prinetti's request. And as reported by M. Barrère in his 22 June dispatch to M. Delcassé, he said:

> "M. Prinetti has asked that it be mentioned that the frontiers of our African possessions on the side of Tripoli *(du c_te de Tripoli)* are those shown by the map annexed to the 1898 Anglo-French Convention." (ML, French Archives Annex, p. 121.)

"No problem" has been M. Barrère's response.

The map specified by Signor Prinetti was a map annexed to the 1898 Convention. There were two such maps, but they were the wrong maps. So this was sorted out, and the reference to the 1899

map which had been included in the *Livre jaune* version was substituted.

In M. Barrère's report, from which I just quoted, the frontier said to have been referred to by Signor Prinetti was the frontier of France's possessions on the side of Tripoli. This was similar to the language of Signor Prinetti's speech the year before, which had been agreed word for word between the Italian and French Governments.

The idea of referring to the line on the *Livre jaune* map depicting the notional frontier of Tripolitania was a practical way to define the limit of French expansion in the 1902 Accord. The map conveniently contained such a line representing this notional frontier.

In both its Counter-Memorial and its Reply, Libya demonstrated that the wavy, dashed line encircling Tripolitania on the map was not identified on the legend of the *Livre jaune* map as a conventional boundary. Libya has also demonstrated that the "extract" of this map appearing in Chad's Memorial contained a modified legend that wrongly identified the wavy, dashed line encircling Tripolitania as a boundary of French possessions according to prior conventions. I shall not demonstrate this here on the screen, but I refer the Court to Nos. 42 and 43 of the Map Folder, where this demonstration is made again and which you may want to consider at your leisure.

When Signor Prinetti suggested that a reference to this line be added to the 1902 Accords, he did not accept it as a boundary of Tripolitania. The map did now show it as a boundary. He accepted it as the definition of what was meant in France's unilateral declaration in 1900 as the limit of French expansion eastward for Tunisia and Algeria toward Tripoli. It was a bilateral agreement making more precise a unilateral declaration. The line on the map was a convenient way of depicting the limit of French expansion.

The other 1902 Accord of relevance, but of less direct relevance, was the Anglo-Italian Accord of 1902. If we can put on the screen now the area that this was concerned with, the Court can see in red that the area of British interest is on the east of Tripolitania. I should point out that the red-shaded area, called "Area of British Interest", is not intended to suggest that either a British or an Egyptian sphere of influence extended into this area. The point is simply that this side of Tripolitania was of interest to the British at the time, not to the French.

In 1902, any potential encroachment of Tripolitania from France's possessions, of course, would have been from the east, from the area that was coloured in blue, and from the British and the Egyptians from the east.

So to conclude, the meaning of these 1900 and 1902 Franco-Italian Accords is straightforward. There was no Tripolitania boundary in 1902, only a notional frontier as shown on the *Livre jaune* map. It was accepted by Italy only in the sense that it explained where M. Barrère in 1900 said France's limit of expansion eastward lay. Neither Italy nor France had any standing then to fix a boundary, in any event.

In these Accords, the only French sphere of influence recognized by Italy had to do with Morocco. And the British Accord dealt with no line north of 15° N latitude and recognized no spheres of influence.

Thus, as of the end of 1902 — if we again put up the *boundary* map on the screen, no change in the boundary situation had taken place as a result of these Accords. The wavy, dashed line encircling "Tripolitaine" on the map, which appears on the screen, was not a boundary for all the reasons explained earlier, not least of which being that it was not identified as a boundary on the map. Until 1910, no part of Tripolitania's frontier was fixed by international agreement, so the wavy, dashed line comes off the map.

There were two other agreements in this period up to 1912 to be mentioned, and I shall do so very quickly because they again were discussed in Libya's pleadings.

The 1910 Franco-Ottoman Treaty was discussed in Libya's Memorial starting at paragraph 5.11. There are three points of relevance here. First, it establishes the boundary for the first time and the text makes that clear. It therefore refutes the notion that there was already a Tripolitanian frontier or boundary. It is another illustration that when France wanted to limit a boundary it did so in detail, and followed up by demarcation. And the two parties to the Agreement, France and the Ottoman Empire or Tunisia, had the status to agree a boundary, which was not the case in 1902 and was not the case in 1899 north of 15° N latitude.

The other Agreement is discussed in great detail in Libya's Reply, paragraphs 6.84 to 6.109,

and that is the 1912 Tittoni-Poincaré Agreement, which Professor Condorelli was deal with as well.

The text of the Tittoni-Poincaré Agreement — this is in folder No. 51 — has no mention of a boundary in it at all, and the *travaux* reveal that M. Poincaré originally had the idea at the time to use his negotiating advantages with Italy to settle the boundary question with Italy, but he abandoned that idea and it was left for the future negotiations with Italy.

It is apparent that nothing in the 1912 Tittoni-Poincaré Agreement could have transferred the 1900 and 1902 Accords into something that they were not. There is nothing in the text of 1912 to modify the meaning or effect of the 1902 Accord to which it refers. But this is very fully discussed in Libya's pleading.

I would like to end, therefore, by showing on the *boundary* map once more the boundary situation but I think we will save that for another occasion.

Thank you very much, Mr. President, Members of the Court.

I would be grateful if you would call on Professor Condorelli.

The PRESIDENT: Thank you very much, Mr. Sohier. Professor Condorelli, please.

M. CONDORELLI :

Introduction

Monsieur le Président, Messieurs les juges,

Permettez-moi de vous dire avant tout combien je ressens l'honneur, et en même temps la responsabilité, de prendre la parole devant votre Cour pour la première fois, et combien je sais gré au Gouvernement libyen de m'avoir confié cette haute tâche.

La précédente plaidoirie vous a présenté la situation existant, en droit et en fait, dans les territoires objets du présent différend, à l'époque où la Libye faisait partie de l Empire ottoman. La carte qui manquait va être présentée tout à l'heure. En l'absence de tout engagement conventionnel limitant l'étendue vers le sud du territoire libyen, le Sultan exerçait paisiblement son autorité sur toute la zone en question : une zone dont les populations étaient reliées à lui par un lien d'allégeance reposant sur la commune foi musulmane. Au nom de ce lien d'allégeance les tribus locales, face au

danger représenté par l'avancée progressive vers le nord des forces coloniales françaises, avaient demandé que la Porte assure au mieux leur défense sur le plan militaire et diplomatique. Et, au nom toujours de ce lien d'allégeance, la Porte avait en effet déployé dans la région les signes tangibles de son autorité (son drapeau, son administration, ses forces militaires) et avait réussi à arrêter l'avancée française.

Ce faisant, l'Empire ottoman n'avait empiété sur les compétences territoriales d'aucun autre Etat; d'après les principes de droit international en vigueur à l'époque, en effet, aucune des puissances qui avait des visées coloniales sur la zone n'y avait acquis de droit de souveraineté. Cette zone, tout en faisant partie de ce que les autorités ottomanes considéraient comme l'*hinterland* de la Tripolitaine, se trouvait donc dans une situation juridique bien différente, par rapport aux autres parties dudit *hinterland*, puisque la présence ottomane y était effective, y était parfaitement légale et correspondait aux voeux des populations concernées.

Autrement dit, sur la revendication territoriale plus large, qu'exprimait la théorie de l'*hinterland*, se greffait ici l'emprise effective de la Porte sur la zone concernée.

Il est temps maintenant, Monsieur le Président, de se pencher sur le moment où la Sublime Porte sort de scène, suite à sa défaite de 1912, et est remplacée en Libye par l'Italie qui va établir sa souveraineté sur le territoire libyen et va la maintenir de 1912 jusqu'à la fin de la seconde guerre mondiale. Il faut alors étudier comment ce transfert de souveraineté a affecté le statut de la zone en question : c'est ce que je vais faire dans la présente plaidoirie, que je vais diviser en trois parties.

Dans la première, j'analyserai les caractéristiques de la succession intervenue en vertu du traité d'Ouchy entre l'Empire ottoman et l'Italie, concernant le territoire libyen.

Dans la deuxième partie, je montrerai d'abord que la France a reconnu sans réserve d'aucune sorte la succession entre la Porte et l'Italie concernant le territoire libyen. Ensuite je rappellerai et confirmerai qu'au moment où cette succession est intervenue, l'Italie n'était liée par aucun engagement préalable avec la France (ni n'en a contracté aussitôt un nouveau) l'obligeant à reconnaître l'existence d'une frontière méridionale libyenne.

Dans la troisième et dernière partie, il sera question des préliminaires de négociation entre la

France et l'Italie en vue de la délimitation des frontières libyennes dans la période précédant le début de la première guerre mondiale; cette analyse permettra de comprendre, entre autres, les raisons qui amèneront l'Italie, après la guerre, à mettre quelque peu en sourdine dans ses discussions avec la France l'argument de l'héritage ottoman et à utiliser plutôt l'argument des droits découlant pour elle de l'article 13 de l'accord secret de Londres de 1915.

PREMIERE PARTIE
Le traité d'Ouchy et la succession entre l'Empire ottoman et l'Italie

1. La conquête italienne de la Libye et l'effet juridique du traité d'Ouchy

Monsieur le Président, Messieurs les juges, il n'y a pas de vraie divergence de vue entre les Parties quant à la signification juridique de l'acceptation par la Sublime Porte, au moyen du traité de paix d'Ouchy des 15-18 octobre 1912, de la situation résultant du conflit de 1911-1912 entre l'Italie et l'Empire ottoman. Il n'est ni contesté ni contestable que, grâce à ce traité de cession territoriale, l'Italie acquit le droit d'exercer sa souveraineté sur l'ensemble du territoire libyen que l'Empire ottoman lui cédait. La Libye a présenté cet argument depuis son mémoire et, dans son contre-mémoire, le Tchad en reconnaît sans difficulté la pleine validité, lorsqu'il admet que, d'après le droit international général en vigueur à l'époque de la conquête italienne de la Libye, en cas d'annexion d'une partie du territoire d'un Etat souverain par un autre Etat souverain, "la succession d'Etat ne portait atteinte ni aux frontières ni aux droits et obligations se rapportant au régime du territoire annexé" (c'est le contre-mémoire tchadien qui se prononce ainsi, p. 272, par. 7.06).

Monsieur le Président le traité d'Ouchy est donc un document important, et ceci malgré qu'il ne contienne effectivement aucune disposition identifiant précisément l'étendue du territoire que la Porte cédait à l'Italie. Le Tchad a tort lorsqu'il prétend que cette absence de précisions suffirait à rendre totalement superflue la prise en considération du traité. Il s'agit là de toute évidence d'une analyse plutôt superficielle : avec ou sans dispositions spécifiques en matière de frontières, le traité d'Ouchy constitue la base juridique légitimant la présence italienne en Libye. C'est en vertu de cette cession conventionnelle du territoire libyen que l'Italie y a acquis le titre juridique de souveraineté, et

donc le droit d'en disposer, y compris au moyen d'éventuels accords de délimitation qu'elle n'aurait de toute évidence pas pu valablement conclure à l'époque où le territoire concerné ne lui appartenait pas.

Finalement, Monsieur le Président, s'il y a un désaccord entre la Libye et le Tchad concernant le traité d'Ouchy, ce n'est pas à propos de la portée juridique du traité dans les relations entre l'Italie et la Porte. Le désaccord porte plutôt sur la question différente (que je vais discuter dans la deuxième partie de ma plaidoirie) de savoir si l'Italie, au moment de succéder à l'Empire ottoman, était ou s'est engagée avec la France à accepter de considérer comme délimité vers le sud le territoire en question. Au sujet de l'effet *inter partes* du traité d'Ouchy, donc, la Cour peut certainement considérer comme établies les conclusions essentielles suivantes, qui ne forment l'objet, me semble-t-il, d'aucune divergence réelle entre les Parties.

En 1912, au moyen du traité d'Ouchy, l'Italie a succédé à l'Empire ottoman dans le titre de souveraineté sur toutes les populations et sur tous les territoires qui, avant la conclusion du traité, étaient légalement soumis à la souveraineté ottomane. Puisque le territoire cédé à l'Italie ne pouvait être que le même qui avait légalement appartenu à la Porte, il s'ensuit que tout accord de délimitation des frontières libyennes qui liait l'Empire ottoman avant octobre 1912 allait lier l'Italie après cette date : tel est le cas de la convention entre la France et la Porte du 12 mai 1910 concernant la frontière tuniso-libyenne. Par contre, dans la région qui forme l'objet du présent différend, aucune délimitation de frontières liant la Porte n'avait été convenue avant 1912; par conséquent l'Italie reçut un territoire non délimité vers le sud et hérita naturellement de tous les titres juridiques précédemment détenus par l'Empire ottoman et pertinents pour la délimitation ultérieure du territoire en question.

2. Confirmations pouvant être tirées de certaines dispositions du traité et de leur mise en oeuvre

Monsieur le Président, Mesdames et Messieurs les juges, la conclusion que je viens de présenter ne se justifie pas seulement à cause de la nature du traité d'Ouchy, accord de cession de territoire. Plusieurs dispositions du traité montrent également, de façon parfaitement claire, comment les Parties concevaient l'objet de cette cession, c'est-à-dire quels critères d'ordre territorial et personnel

identifiaient dans leur esprit un tel objet.

Il faut d'abord rappeler que le traité d'Ouchy est un document complexe, consistant en un accord préliminaire, quatre annexes et un traité de paix définitif. L'accord préliminaire du 15 octobre, au nom du désir des deux Etats de faire cesser l'état de guerre entre eux, les engage à adopter chacun des mesures législatives dont le texte est fixé dans trois des annexes du traité, qui forment "partie intégrante" du traité lui-même. Enfin, le traité définitif, dont le texte figure dans la dernière annexe, devait être signé immédiatement après la promulgation par les deux Etats des deux mesures législatives prévues, et fut effectivement signé à Lausanne trois jours plus tard, le 18 octobre 1912. Or, l'étude de cet ensemble de documents permet de constater quelle était l'intention des parties contractantes : sans aucun doute, la Porte cédait à l'Italie le droit d'exercer sa souveraineté sur toutes les populations de la Libye soumises jusque-là à son autorité et sur tous les territoires qui étaient sous souveraineté ottomane.

Concernant les populations, les données pertinentes se dégagent plus particulièrement de deux des documents figurant dans les annexes à l'accord préliminaire : le firman impérial, que le Gouvernement ottoman allait aussitôt promulguer, et le décret royal italien correspondant.

Dans le firman, le Sultan s'adressait aux habitants des territoires qu'il cédait à l'Italie et leur concédait une "pleine et entière autonomie". Cette autonomie devait comporter, d'une part une pleine garantie de la liberté religieuse, y compris le droit de maintenir les liens d'allégeance religieuse avec le Sultan, par l'entremise de ses représentants; d'autre part la possibilité de "contribuer" par des conseils appropriés à ce que les "nouvelles lois" auxquelles le pays serait soumis — suivant la prescription du texte — correspondent "à vos besoins et à vos coutumes" (c'est le Sultan qui s'adresse aux populations des territoires concernés).

Du côté italien, le décret royal devait en premier lieu accorder l'amnistie aux membres des populations concernées qui avaient pris part aux hostilités; ensuite, devait garantir la liberté du culte musulman aux habitants de la Libye; enfin, devait permettre la participation de notables indigènes à la préparation de la législation pour les provinces libyennes.

Ces clauses montrent bien qu'en vertu du traité d'Ouchy l'Italie acquit en même temps des

droits et des obligations concernant les populations libyennes : l'Italie se vit reconnu par la Porte le droit d'administrer l'ensemble de ces populations, mais du même coup assuma l'obligation d'en garantir l'"autonomie". Il est évident que le critère d'identification des populations concernées par la cession était constitué par leur lien d'allégeance au pouvoir ottoman : or, justement, il est certain que les habitants de la région en question, à l'époque, avaient un tel lien d'allégeance avec le Sultan, puisqu'elles en reconnaissaient l'autorité tant politique que religieuse.

Venons maintenant au territoire formant l'objet de la cession. Il est vrai qu'aucune disposition du traité ne l'identifie précisément.

Mais une indication indirecte, et décisive, peut être tirée de l'article II du traité définitif, par lequel le Gouvernement ottoman s'engageait à retirer de la Libye ses officiers et ses troupes. Très évidemment, cette obligation se référait à tous les emplacements des territoires concernés où des militaires sous autorité ottomane étaient placés à ce moment-là, en 1912. Or, justement, on peut le voir à l'écran, des forces turques contrôlaient effectivement la zone faisant l'objet du présent différend, comme le Tchad l'a d'ailleurs franchement reconnu dans son mémoire, quitte à tenter de revenir en arrière par la suite dans ses autres écritures (je me permettrai d'observer que ce n'est pas là le seul sujet dans lequel l'argumentation tchadienne révèle un caractère quelque peu erratique...!)

En effet, au paragraphe 135 de la page 179 du mémoire, le Tchad admet que la présence turque dans la région (notamment à Bardaï et à Ain Galaka) fut effective, quoique limitée, et que, "compte tenu des circonstances et du caractère peu hospitalier de la région, cette présence effective aurait pu être de nature, conformément au droit de l'époque, à constituer un titre territorial suffisant" (mémoire du Tchad). Certes, les forces turques furent ensuite retirées en exécution du traité : il ne s'est donc pas agi d'un acte de *derelictio* transformant le territoire concerné en une *terra nullius*, comme le Tchad voudrait le faire croire (mémoire du Tchad, p. 180, par. 138), mais d'une mesure par laquelle l'Empire ottoman s'acquittait de ses obligations de caractère conventionnel envers l'Italie. Celles-ci furent donc indiscutablement mises en oeuvre en les interprétant dans le sens que le territoire libyen cédé par la Porte à l'Italie, et duquel la Porte devait se retirer, comprenait la zone que la Libye revendique aujourd'hui.

C'est exactement ce qu'en janvier 1913 le ministre des affaires étrangères de l'Empire ottoman avait communiqué en toute officialité à l'ambassadeur de France, lequel s'inquiétait des mesures qui avaient été prises par les autorités ottomanes au Tibesti et au Borkou, dans la zone qui nous intéresse; voila ce que l'ambassadeur rapportait le 24 janvier 1913 à son ministre, M. Poincaré, au sujet de cet entretien :

> «Gabriel Effendi [le ministre ottoman des affaires étrangères] ... m'a déclaré qu'à la suite du traité de Lausanne le Gouvernement ottoman avait donné l'ordre à tous ses officiers et soldats en Tripolitaine et en Cyrénaïque de rentrer en Turquie." (Réplique de la Libye, vol. 3, pièce 10-21.)

Cette déclaration se référait donc à la zone que nous sommes en train de discuter. Comme on le voit, tant pour la Porte que pour la France, il allait de soi que les obligations découlant du traité d'Ouchy portaient également sur la zone en question. On est confronté ici, de toute évidence, à un élément très significatif de la "pratique ultérieurement suivie dans l'application d'un traité" qui, d'après les principes consacrés à l'article 31 de la convention de Vienne sur le droit des traités, a un rôle capital dans l'interprétation des traités internationaux.

Monsieur le Président, il est important de signaler à ce sujet que le mémoire tchadien admet à plusieurs reprises que le retrait des forces ottomanes de la zone en question intervint en exécution des clauses du traité d'Ouchy (contre-mémoire du Tchad, p. 187, par. 5.53; p. 191, par. 5.65; p. 215, par. 5.132; p. 250, par. 6.35; p. 258, par. 6.55). Ces admissions explicites rendent, me semble-t-il, superflue toute discussion ultérieure et permettent de considérer comme établi qu'au moyen du traité d'Ouchy la Porte céda à l'Italie l'ensemble du territoire libyen, y compris la zone qui forme l'objet du présent différend.

3. Les ambiguïtés du traité d'Ouchy ne concernent pas l'étendue du territoire cédé à l'Italie et, de toute façon, furent éliminées par la suite

Monsieur le Président, dans le cadre de sa stratégie visant à conjurer l'effet du traité d'Ouchy sur le règlement du présent différend, le Tchad insiste sur le fait que ce traité, outre son imprécision concernant les limites du territoire cédé, était délibérément vague, obscur, contradictoire et ambigu, comme d'ailleurs plusieurs commentateurs à l'époque l'observèrent (contre-mémoire du Tchad, p. 275 et suiv.)

La Libye n'a aucune difficulté à reconnaître cela : il est vrai que par une très habile négociation la diplomatie ottomane avait réussi à arracher à l'Etat victorieux un traité de paix singulièrement modéré, qui maintint à la Porte une étonnante série de droits et de privilèges en Libye; l'Empire ottoman put même prétendre par la suite qu'il avait cédé à l'Italie seulement l'exercice de la souveraineté sur le territoire concerné, alors que la titularité de cette souveraineté était retenue par elle.

Cependant, il faut aussitôt souligner que l'ambiguïté du traité concernait des aspects qui n'ont rien à voir avec la validité des remarques précédentes quant à l'identification des limites spatiales du territoire cédé et des populations concernées par cette cession. Il est vrai que le traité d'Ouchy semblait répartir de façon très étrange les compétences relatives au territoire et aux populations libyens entre l'Italie et l'Empire ottoman. Mais il reste — et c'est l'essentiel — que le territoire et la population concernés par cette répartition étaient bien ceux tout entiers de la Libye, tels que la Porte les contrôlait avant 1912.

Il convient encore d'ajouter que de toute façon les ambiguïtés du traité d'Ouchy furent levées par la suite, au moyen de l'abolition de tous les droits et privilèges qu'il laissait subsister en faveur de l'Empire ottoman. Déjà en 1915 l'Italie, la France et la Grande-Bretagne s'étaient accordées entre elles pour que cette abolition intervienne dès que possible : l'article 10 du traité secret de Londres de 1915 le dit : "L'Italie sera substituée en Libye aux droits et privilèges appartenant actuellement au Sultan en vertu du traité de Lausanne."

Après la guerre, enfin, la Turquie elle aussi accepta cette abolition en vertu de l'article 22 du traité de Lausanne de 1923, dont il sera question dans la prochaine plaidoirie du professeur Cahier.

Monsieur le Président, tous les éléments recueillis démontrent le bien-fondé de la conclusion principale de cette première partie de plaidoirie : en octobre 1912, l'Italie succéda à l'Empire ottoman dans le droit de souveraineté sur la totalité du territoire libyen, tel que la Porte le contrôlait précédemment, y compris donc la zone qui forme l'objet du présent différend. Cette succession comporta que l'Italie resta liée par les accords de délimitation que la Porte avait conclus avant cette date. En revanche, là où le territoire n'était pas délimité, l'Italie hérita de cette situation et, donc, d'un

territoire aux frontières non définies; elle hérita également de tous les titres juridiques que la Porte aurait pu invoquer afin de parvenir ultérieurement à la définition des frontières.

Mais les remarques précédentes démontrent aussi autre chose : en succédant à la Turquie, l'Italie s'était engagée à administrer sa colonie libyenne en respectant l'autonomie des populations locales; autrement dit, l'Italie avait souscrit l'obligation internationale de respecter l'identité de ces populations et de leur garantir une forme de *self-government*. L'Italie reconnut ainsi que le peuple libyen avait des droits internationalement garantis qui lui étaient opposables. Or, il est important de rappeler que pendant la première période de sa présence coloniale en Libye, et avant l'arrivée du fascisme au pouvoir en Italie, l'Italie essaya justement de s'acquitter de ses obligations à l'égard des populations libyennes.

Les étapes principales de cette "politique de pacification" menée par l'Italie face à la résistance organisée en Libye, sous l'égide des Senussi, avec toute la panoplie d'accords conclus entre les deux pouvoirs, l'Italie et la Senussya, on été évoquées dans le mémoire libyen (p. 271 et suiv.), et je n'ai pas l'intention d'y revenir maintenant. Je n'ai pas non plus l'intention de reprendre le récit concernant la dénonciation successive de tous ces accords, décidée par le Gouvernement italien le 1er mai 1923, après l'arrivée du fascisme au pouvoir et le déclenchement de la sanglante répression qui se termina avec la fin de la seconde guerre entre l'Italie et la Senussya (1923-1932). Je voudrais seulement souligner combien tous ces événements mettent en évidence la signification de la lutte continue du peuple libyen, d'abord contre le pouvoir colonial français venant du sud, puis contre le pouvoir colonial italien arrivant du nord : véritable lutte de libération menée par un peuple dont l'identité, en tant que peuple justement, ainsi que son droit à l'autonomie, ont été internationalement reconnues pour la première fois en 1912, en vertu du traité d'Ouchy.

DEUXIEME PARTIE

La reconnaissance par la France de la souveraineté italienne sur la Libye suite au traité d'Ouchy et la question de la délimitation du territoire libyen

I. La thèse tchadienne

Monsieur le Président, j'en viens maintenant à la deuxième partie de ma plaidoirie. Je viens de

constater qu'en octobre 1912 l'Italie acquit par voie conventionnelle le titre de souveraineté sur l'ensemble du territoire libyen, tel qu'il était soumis à l'emprise de l'Etat prédécesseur avant cette date. Or ce territoire n'avait jusque-là été délimité, quant à sa frontière méridionale, par des actes capables de lier le souverain territorial, à savoir l'Empire ottoman. De son côté, l'Italie n'avait certainement pu, je l'ai dit, conclure valablement un quelconque accord de délimitation par rapport à un territoire avant que celui-ci ne lui appartienne. Le Tchad ne semble d'ailleurs pas prétendre le contraire.

La thèse du Tchad (très compliquée à vrai dire, et difficile à synthétiser en termes clairs) est plutôt — semble-t-il — qu'en 1900-1902 l'Italie avait obtenu de la France que celle-ci lui reconnaisse la liberté de développer sa sphère d'influence en Libye, mais en contrepartie aurait reconnu à son tour la validité de la sphère d'influence française, dans les limites résultant de la déclaration franco-anglaise de 1899. Tant la déclaration de 1899 que la prétendue reconnaissance par l'Italie de sa validité ne pouvaient évidemment pas produire le moindre effet juridique pour la Porte, en tant que *res inter alios*. Mais, d'après le Tchad, dès que l'Italie obtint la souveraineté sur le territoire libyen, elle se serait trouvée liée envers la France par sa propre reconnaissance et, conséquemment, empêchée de revendiquer au titre des droits ottomans des territoires situés dans la sphère d'influence française : de ce fait, la ligne prétendument reconnue par l'Italie comme limite de la sphère d'influence française se serait transformée, comme par enchantement, en ligne-frontière. En somme, l'opinion du Tchad est — à ce qu'il paraît — qu'en 1900-1902 l'Italie aurait contracté à l'avantage de la France un engagement, relatif à des sphères d'influence, ayant un effet retardé et éventuel, c'est-à-dire soumis à une sorte de condition suspensive : cet engagement allait devenir opérationnel, et changer de nature en engendrant une frontière, dans le cas d'une future conquête italienne de la Libye et à partir de ce moment-là exclusivement.

Monsieur le Président, Messieurs les Juges, la Libye a déjà démontré que la thèse tchadienne concernant les accords franco-italiens de 1900-1902, n'est pas seulement (comment dirais-je ?) "acrobatique" : elle est aussi carrément erronée, puisqu'elle s'appuie sur une interprétation, vous l'avez entendu, qui n'est soutenue ni par la lettre, ni par l'esprit, ni par les travaux préparatoires de

ces accords. Je n'ai donc pas besoin, de revenir sur ce point. Il convient toutefois d'ajouter maintenant que les accords franco-italiens de 1900-1902 avaient été conclus à une époque où la situation sur le terrain, concernant le sud libyen, n'avait rien de commun avec la situation de 1912. En 1902, la pénétration coloniale de la France n'avait concerné que des zones très lointaines de celle qui forme l'objet du présent différend autour du lac Tchad : on pourrait même dire que la zone du présent différend était pour les Européens une véritable *terra incognita* : on n'avait qu'une très vague connaissance de ses caractéristiques tant géographiques qu'humaines. Cette zone n'avait donc pas besoin d'être protégée et défendue par la Porte, puisqu'aucun danger imminent d'invasion étrangère ne la guettait en 1902. Mais en 1912, à la veille du traité d'Ouchy, la France s'était beaucoup rapprochée de cette dernière zone, même si elle n'y avait pas encore pénétré, alors que la Porte, pour parer justement à la menace désormais toute proche de l'invasion française, y avait déployé les signes extérieurs de son emprise souveraine effective, notamment en y plaçant des garnisons pour la défendre conjointement avec la Senussya.

Par conséquent, si l'interprétation tchadienne des accords franco-italiens de 1900-1902 était exacte, l'engagement prétendument contracté par l'Italie en 1902, qui était d'après le Tchad de ne pas contester le droit de la France *d'étendre* sa conquête vers le nord jusqu'à la ligne de 1899, se serait magiquement transformé, en octobre 1912, en un engagement radicalement différent : à savoir, la renonciation à des droits territoriaux à peine acquis en vertu du traité d'Ouchy, et dont l'extension exacte ne pouvait pas avoir été prévue dix ans plus tôt. En 1902, en effet, ni la France ni l'Italie ne pouvaient prévoir la situation factuelle et juridique dans laquelle allaient se trouver en 1912, dix ans plus tard, les régions du Sud libyen; elles ne pouvaient pas deviner, en particulier, que l'Empire ottoman y aurait placé les signes visibles de son emprise souveraine effective, notamment sous la forme la plus évidente d'installations militaires fixes qui n'existaient pas au début du siècle. En somme, il n'est pas crédible qu'une pareille transformation radicale de la nature et de l'effet de l'engagement de 1902 soit intervenue en 1912 sans que les Etats concernés l'aient constatée et en aient pris acte ouvertement.

Or, que s'est-il passé après la conclusion du traité d'Ouchy, entre la France et l'Italie ?

2. La reconnaissance unilatérale et sans réserve par la France, le 20 octobre 1912, de la souveraineté italienne en Libye

Ce qui s'est passé est que la France, comme les autres puissances européennes, s'est hâtée de reconnaître unilatéralement la nouvelle situation; et ce déjà le 20 octobre 1912, deux jours après la conclusion du traité définitif. La formule qui a été utilisée par le ministre des affaires étrangères français de l'époque, M. Poincaré, comme il le relate lui-même (réplique de la Libye, pièce 5), est la suivante : "Le Gouvernement de la République reconnaît la souveraineté de l'Italie sur la Tripolitaine et la Cyrénaïque." En somme, au moment où, en vertu du traité d'Ouchy, l'Italie devenait juridiquement le nouveau maître du territoire libyen, en succédant à tous les droits y relatifs dont l'ancien maître était le titulaire, la France a pris acte de cette situation et reconnu sans la moindre réserve qu'elle lui était opposable : autrement dit, la France a reconnu que, par rapport au territoire en question, l'Italie allait se trouver exactement dans la même situation juridique qui était auparavant celle de la Turquie.

3. Le traité Tittoni-Poincaré du 28 octobre 1912

Mais après l'avoir fait unilatéralement la France a confirmé, par voie cette fois-ci de convention, la reconnaissance de la situation juridique issue du traité d'Ouchy : je me réfère ici au traité Tittoni-Poincaré du 28 octobre 1912, dont le rapport avec les accords franco-italiens de 1900-1902 a été expliqué partiellement dans la précédente plaidoirie de M. Sohier. De ce fait, je n'ai pas besoin de revenir sur l'analyse détaillée de ce traité. Je me limiterai seulement à rappeler que ce traité ne porte aucunement sur des questions de frontières; les travaux préparatoires confirment de la façon la plus nette qui soit que les parties n'eurent pas la moindre discussion sur la frontière méridionale de la Libye et même (comme le Tchad l'a d'ailleurs admis) qu'elles ne songèrent jamais à évoquer cette question pendant aucune phase de la négociation, alors qu'elles évoquèrent à un moment donné le dossier de la frontière occidentale (celle du côté de l'Algérie) qui fut finalement laissé lui aussi de côté.

Quant à la référence — puisque c'est cela le problème important; le traité Tittoni-Poincaré se réfère aux accords franco-italiens de 1902 — il faut rappeler que cette référence figure dans un considérant du préambule, et elle a pour but d'expliquer la raison qui amenait les parties à confirmer

des engagements préexistants : des engagements qui, comme le traité l'explicite, n'ont rien à voir avec les frontières. En somme, le traité de 1912 évoque les accords de 1902 afin de spécifier quelles obligations découlent de ceux-ci dans la nouvelle situation résultant du fait que l'Italie a acquis la souveraineté sur la Libye; or, le fait même que dans le traité il est question d'obligations qui ne concernent en rien les frontières libyennes est la preuve la plus claire qui soit que tant pour la France que pour l'Italie les accords de 1902 étaient dépourvus de toute pertinence en matière de délimitation.

En conclusion, sur ce point, outre la confirmation de la reconnaissance par la France de la souveraineté italienne sur le territoire libyen, le traité Tittoni-Poincaré ni n'exprime ni n'implique la reconnaissance ou l'acceptation par l'Italie d'une quelconque frontière méridionale du territoire libyen; également, ce traité ni n'exprime ni n'implique la moindre renonciation par l'Italie aux titres territoriaux faisant partie de l'héritage ottoman.

4. Après 1912 la France a explicitement reconnu la souveraineté italienne sur la Libye comme issue du traité d'Ouchy

Monsieur le Président, Messieurs les juges, dans ses écritures le Tchad soutient que la France aurait reconnu la souveraineté italienne sur le territoire libyen, mais non pas le traité d'Ouchy qui était et restait pour elle *res inter alios*. On peut comprendre la préoccupation qui est à l'origine de cette distinction quelque peu byzantine : c'est que le Tchad a sans aucun doute peur du traité d'Ouchy, vu que celui-ci transmet à l'Italie l'ensemble des titres territoriaux que l'Empire ottoman possédait par rapport à la Libye avant octobre 1912. Autrement dit, si la France a reconnu le traité d'Ouchy, la France a reconnu aussi que l'Italie a hérité de tous les titres territoriaux que le traité d'Ouchy lui a transmis.

Mais la thèse tchadienne est indéfendable pour diverses raisons.

Il faut dire en premier lieu que la France n'avait pas pu reconnaître sans la moindre réserve la souveraineté italienne sur le territoire libyen, deux jours après la conclusion du traité d'Ouchy, sans reconnaître la source de cette souveraineté, puisqu'il s'était agi justement d'une acquisition en vertu d'un traité de cession territoriale.

Mais il y a bien plus. Si le traité d'Ouchy n'est pas nommément cité dans l'acte unilatéral français de reconnaissance, et non plus dans le texte du traité Tittoni-Poincaré, quelques ans plus

tard, en revanche, il a formé nommément l'objet de diverses dispositions conventionnelles liant la France, qui en a donc reconnu explicitement la conformité à ses intérêts. J'ai déjà cité les plus importantes de ces dispositions, sur lesquelles le professeur Cahier reviendra : il s'agit de l'article 10 du traité de Londres de 1915 et de l'article 22 du traité de Lausanne de 1923.

En somme, tant en 1915 qu'en 1923 la France a participé à des accords internationaux reconnaissant explicitement que l'Italie avait succédé à l'Empire ottoman, concernant la Libye, justement en vertu du traité d'Ouchy. A ces occasions, la France a même reconnu que l'Italie avait succédé à la totalité des droits et titres concernant le territoire libyen, y compris ceux qu'au début le traité d'Ouchy avait maintenus en faveur de la Sublime Porte.

TROISIEME PARTIE

Les événements saillants entre 1912 et la première guerre mondiale

1. Les préparatifs français de 1913-1914 en vue de négociations avec l'Italie

J'en viens maintenant, Monsieur le Président, Messieurs les juges, à la troisième et dernière partie de ma plaidoirie. Mon but ici est de mettre en lumière certains événements saillants intervenus entre le moment où l'Italie devient souveraine en Libye et la première guerre mondiale. Il s'agit d'événements importants parce qu'ils permettent de comprendre quelle sera désormais la stratégie de négociation de la France et de l'Italie concernant le tracé de la frontière méridionale de la Libye, et ce jusqu'à la fin de leur emprise coloniale respective.

Il convient de commencer par les grandes lignes de l'action française, tant sur le plan militaire que sur celui diplomatique.

Au plan militaire, on sait qu'en juin 1913 le Gouvernement français, profitant du retrait des forces turques de la région et des difficultés auxquelles était confrontée l'Italie pour établir son emprise sur le territoire libyen, autorisa le colonel Largeau à lancer une offensive vers le nord. Celle-ci amena finalement, entre 1913 et 1919, à l'établissement d'un nombre très limité de postes militaires dans une partie seulement de la région en question : comme la Libye l'a démontré dans ses écritures (contre-mémoire de la Libye, p. 259 et suiv., par. 5.35 et suiv.), la présence extrêmement réduite des forces françaises ne concerna de toute façon, ni la zone qui depuis les années

soixante-dix a été appelée la "bande d'Aouzou", ni les territoires au nord de la ligne de sud-est telle que prévue par la déclaration franco-britannique de 1899. Là où cette présence a eu lieu, il s'est agi en plus d'une présence purement militaire qui ne comporta aucune administration effective de la vie civile dans les territoires concernés et n'a jamais acquis un caractère pacifique, puisque les forces françaises furent continuellement harcelées par les tribus locales sous le guide de la Senussya.

Quant au plan diplomatique, il faut discuter rapidement des préparatifs français de 1913-14, en vue des négociations futures avec l'Italie concernant la délimitation entre les possessions coloniales françaises et la nouvelle colonie italienne. Les documents présentés à ce sujet au Parlement français, à savoir les rapports Marin de 1913 et 1914 (contre-mémoire de la Libye, p. 232; réplique de la Libye, p. 143), sont du plus grand intérêt, puisqu'ils définissent pour la première fois, dans ses lignes essentielles, la thèse de fond que la France utilisera régulièrement depuis lors : la ligne (voire les lignes) résultant de la carte (non) annexée à la déclaration franco-anglaise de 1899 constitue(nt) la frontière de la Libye, puisque l'Italie a "adhéré" à cette déclaration et a donc "reconnu" la ou les lignes en question. Par conséquent, (c'est la thèse française) la délimitation étant faite, seulement une opération de démarcation resterait à effectuer. Aujourd'hui, c'est le Tchad qui reprend à son compte cette thèse, à quelques détails près, et la présente à votre Cour.

Monsieur le Président, Messieurs les juges, voici un fait indiscutable : le Tchad vous demande en substance de régler aujourd'hui le différend en prenant pour argent comptant la thèse française de 1913-14. Or l'histoire même du différend se charge, si l'on veut bien la lier, de mettre clairement en lumière que les caractéristiques essentielles de cette thèse la rendent absolument non idoine à servir de base pour un juste règlement du différend territorial qui vous est soumis.

Qu'il me soit permis d'illustrer avant tout l'aspect le plus singulier et le plus étonnant de cette thèse, qui en met d'emblée en exergue le caractère profondément inéquitable. La France d'abord et le Tchad maintenant prétendent qu'une délimitation très précise de source conventionnelle serait venue en existence sans avoir jamais été négociée par les autorités responsables des territoires délimités : cette délimitation résulterait en effet de l'accumulation et de l'imbrication d'une série d'instruments

internationaux d'époques diverses, tous conclus par des Etats qui, aux moments pertinents, n'exerçaient pas leur souveraineté sur les territoires concernés. De plus, la délimitation en question représenterait une sorte de résultat non intentionnel découlant par implication de traités internationaux dont aucun n'avait pour but direct ou indirect de fixer des frontières.

J'en viens au deuxième aspect. Si l'on étudie de près à quelle occasion et dans quel but la thèse en question avait été mise au point en 1913-14 par la France, on s'aperçoit sans l'ombre d'un doute qu'il s'était agi ni plus ni moins que de fixer des positions de départ pour des négociations futures. La France, en somme, allait se présenter aux rendez-vous de négociations diplomatiques avec une certaine requête, et c'est à partir de là qu'elle aurait discuté, en quête d'un compromis approprié.

C'est d'ailleurs exactement ce qui s'est passé pendant plus de deux décennies de pourparlers diplomatiques franco-italiens, jusqu'en 1935 : la France, en effet, a toujours accepté d'envisager des "concessions", comme on les a appelées, à l'Italie à ce sujet. Et ce qui fut considéré à l'époque du côté français comme une belle victoire diplomatique, à savoir la ligne résultant du traité Mussolini-Laval de 1935, représentait en effet une "concession" de quelque 114 000 km^2 de territoire par rapport à la thèse de départ. Mais il ne faut pas anticiper : je reviendrai sur cette question dans une prochaine plaidoirie.

2. L'article 13 du traité secret de Londres de 1915

Et j'en viens maintenant à mon dernier point. Il s'agit de voir ce qu'il se passe du côté italien concernant cette période, tant sur le plan diplomatique que sur le plan militaire. Sur le terrain, l'Italie est confrontée à de grandes difficultés pour établir son emprise effective au delà des côtes libyennes : en effet, il lui faudra la fin des années vingt et deux guerres contre les Senoussi pour qu'elle puisse étendre son contrôle au sud libyen, au prix de campagnes militaires coûteuses, interminables et extrêmement sanglantes. Mais sur le plan diplomatique la position de l'Italie s'est entre-temps bien renforcée, puisque un événement d'importance s'est vérifié après la conquête italienne de la Libye et avant l'explosion de la première guerre mondiale : cet événement est la conclusion du traité secret de Londres du 26 avril 1915.

Comme on le sait, l'article 13 du traité engagea la France et la Grande-Bretagne à "compenser" (c'est le mot utilisé) équitablement l'Italie si, à l'issue de la guerre qui s'annonçait, leurs domaines coloniaux respectifs allaient s'agrandir au dépens de l'Allemagne. Ces compensations à l'avantage de l'Italie devaient consister, suivant la lettre du traité, "dans *le règlement en sa faveur* des questions concernant les frontières ... [de divers territoires] ... de la Libye". (Les italiques sont de moi.)

Monsieur le Président, Messieurs les juges, dans leurs écritures, les Parties ont évalué de façons très différentes la signification de cette disposition. Mais quelle que puisse être l'interprétation exacte qu'il convient de lui donner, une chose est indiscutable : si les mots ont un sens, l'article 13 implique nécessairement qu'en 1915 les trois parties reconnurent l'existence de questions de frontières, concernant la Libye, qui n'avaient pas été réglées auparavant. Pour ces questions pendantes il était donc prévu qu'elles seraient réglées en faveur de l'Italie : autrement dit, la France et la Grande-Bretagne s'étaient engagées à accepter une solution favorable aux revendications italiennes. Certes, il n'est pas exclu qu'une cession territoriale ait pu faire l'affaire, mais la cession n'était sûrement pas la seule manière de respecter la disposition en question : il pouvait aussi s'agir de la détermination pour la première fois d'une frontière, effectuée en privilégiant les prétentions et les revendications italiennes.

Il faut tout de même observer que la pratique subséquente confirme nettement cette interprétation. Elle met même en évidence que, pour ce qui est de la Libye, il ne fut jamais question entre la France et l'Italie de retoucher la seule frontière déjà délimitée (celle entre la Tunisie et la Tripolitaine) : l'Italie n'invoquera l'article 13 qu'afin de clore des questions qui étaient restées ouvertes jusque-là, faute de délimitations conventionnelles pré-établies; et la France acceptera ce point de vue et reconnaîtra que l'article 13 est pertinent pour la fixation de la frontière algéro-libyenne et pour la frontière méridionale.

Il ne faut pas oublier, à ce propos, que l'influence de l'article 13 sur le règlement du différend relatif à la frontière méridionale a été reconnue par les Etats intéressés, y compris la France, lors des débats intervenus à la fin de la guerre, dans le cadre de la commission coloniale créée par le conseil

suprême allié en 1919; et ceci même si la France refusa de s'incliner aux revendications que l'Italie présenta à cette occasion, sur la base de préparatifs et de programmes coloniaux qui avaient été élaborés par les diplomates italiens à partir de 1916. Il en va de même pour toute la négociation franco-italienne d'après 1919, dans laquelle l'article 13 de l'accord de Londres de 1915 a joué un rôle important : les plaidoiries successives se chargeront de le démontrer.

En somme, Monsieur le Président, Messieurs les juges, et en conclusion, grâce au traité de Londres de 1915 l'Italie a pu se prévaloir, dans ses discussions avec la France au sujet de la frontière méridionale de la Libye, d'un nouvel argument de poids : la France devait s'acquitter d'une obligation spécifiquement souscrite à l'avantage de l'Italie et dont la France a explicitement reconnu l'applicabilité et l'impact pour ce qui est du règlement du différend en question. Il était parfaitement naturel, dans ces conditions, qu'à partir de 1915 l'Italie fasse surtout appel à l'article 13, plutôt qu'à l'héritage ottoman, pendant le processus de négociation : de toute évidence, il était plus avantageux et plus prometteur pour l'Italie d'appuyer ses prétentions sur une base juridique incontestable pour la France (et dont effectivement celle-ci a toujours reconnu la pertinence), alors que l'autre base juridique essentielle des titres italiens (la succession aux titres ottomans) n'a pas fait l'objet d'une reconnaissance précise par la France par voie de traité et fut même contestée par celle-ci une fois mise au point sa stratégie diplomatique. Toutefois l'Italie, en décidant de miser davantage sur le traité de 1915 plutôt que sur les titres ottomans, choisissait l'argument qui se révélait le plus efficace dans les pourparlers avec la France. Mais en agissant ainsi l'Italie n'a certainement pas perdu les titres qu'elle préféra mettre au second plan à cause d'un choix diplomatique parfaitement raisonnable dans les circonstances de l'espèce : il est d'ailleurs certain qu'un Etat n'a pas l'obligation d'utiliser pendant la négociation tous les arguments juridiques existant en sa faveur et, tant que la négociation n'a pas abouti, ne perd pas le droit de se prévaloir par la suite d'arguments moins utilisés.

Je vous remercie, Monsieur le Président, Messieurs les juges, de votre patiente attention à cette heure tardive.

The PRESIDENT: Thank you very much, Professor Condorelli. So we continue tomorrow at 10 o' clock with Professor Cahier. Thank you.

L'audience est levée à 13 h 00.

CR 93/17

International Court
of Justice
THE HAGUE

Cour internationale
de Justice
La HAYE

YEAR 1993

Public sitting

held on Thursday 17 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le jeudi 17 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X - Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center for International Studies, New York University, School of Law,

Mr. Olivier Corten, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X - Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X - Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel,
Mrs. Susan Hunt,
Miss Florence Jovis,
Mrs. Mireille Jung,
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Mr. Cahier.

M. CAHIER : Monsieur le Président, Messieurs les juges, ce n'est pas sans émotion qu'un juriste international plaide devant votre haute juridiction et je tiens à vous dire que c'est un honneur et un privilège pour moi de paraître devant vous dans cette affaire entre la Libye et le Tchad.

Monsieur le Président, Messieurs les juges,

La tâche qui m'incombe aujourd'hui est d'examiner la période qui va de 1919 à la conclusion du traité de 1935 entre l'Italie et la France. La période est assez riche en événements puisque des traités sont conclus entre les protagonistes de notre hirtoire : l'Angleterre, la France et l'Italie, Etats qui multiplient entre eux des négociations. Malgré cela, j'aurai scrupule à retenir trop longtemps votre attention et cela pour deux raisons. D'une part la Libye et le Tchad se sont étendus assez longuement sur ces événements dans leurs écritures et deuxièmement ces événements n'ont guère modifié la situation existante relative à la délimitation de la frontière qui fait l'objet du différend qui vous est soumis.

Mais quelle est la situation en 1919 ? Les collègues qui m'ont précédé vous ont démontré qu'entre les possessions coloniales françaises et italiennes en Libye, la frontière n'a pas été délimitée, hormis le tracé qui va de la Méditerranée à Ghadamès. Tout le reste du tracé est incertitude, même si la France et l'Italie pensent avoir des droits dans la région, mais des droits qui ne sont pas exprimés avec précision et qui méritent de l'être pour que l'on puisse arriver à une véritable délimitation de la frontière. Cette situation doit être complétée par la conclusion, en 1915 d'un texte plus précis, à savoir cet accord de Londres qui prévoyait en faveur de l'Italie des compensations en matière

coloniale. En 1919, donc, la guerre est terminée, les alliés ont gagné et l'on aurait pu penser que dans cette grande négociation globale qui mène au traité de Versailles la France aurait essayé, à la lumière de l'accord de Londres, de délimiter cette frontière libyenne avec l'Italie. Sans doute, des négociations se sont déroulées en mai 1919, mais les propositions françaises ("bien peu de chose" disait Tittoni, le ministre italien des affaires étrangères, dans son discours au Parlement italien du 29 septembre 1919), ces propositions s'avèrent insuffisantes et certainement pas de nature à récompenser l'effort fourni par l'Italie dans la guerre faite aux côtés des alliés.

Voilà, Messieurs, le paysage que l'on découvre - passez-moi l'expression - au lever du rideau en septembre 1919. Du point de vue chronologique, il conviendrait d'examiner en tout premier lieu le traité entre l'Angleterre et la France, étant donné qu'il est du 8 septembre 1919, alors que celui entre la France et l'Italie est du 12 septembre 1919. Si je préfère traiter du deuxième avant le premier, c'est que celui-ci ne concerne guère le différend actuel. En effet, Monsieur le Président, Messieurs les juges, son préambule indique qu'il a été conclu en application de l'article 13 de l'accord de Londres et qu'il a pour but la "fixation" de la frontière entre la Tripolitaine et les possessions françaises d'Afrique dans le secteur qui va de Ghadamès à Toummo, secteur qui ne fait pas l'objet du différend soumis à votre haute juridiction.

Je tiens d'ailleurs à souligner le terme employé par l'article premier de cet accord, à savoir *fixation* de la frontière. Cela prouve une fois de plus ce que le Gouvernement libyen a toujours soutenu, à savoir que dans ce secteur il n'y avait pas de frontière délimitée, autrement le terme employé n'aurait pas été celui de *fixation* mais de *modification*.

Cet échange de notes étant extrêmement précis et d'une clarté parfaite (la Cour en trouvera le texte dans le mémoire libyen, "International Accords and Agreements", annexe n° 18), il n'y aurait pas lieu de s'y arrêter si la partie adverse, selon une méthode qu'elle affectionne, ne s'était pas forcée de lui prêter un sens qui ne résulte aucunement du texte.

Le Tchad estime en premier lieu que ce traité de 1919, décidant que Toummo constitue le point extrême de la Libye vers le sud-ouest, confirme l'acceptation par l'Italie de la frontière de la Tripolitaine indiquée sur la carte annexée à la déclaration franco-britannique de 1899 (mémoire du Tchad, p. 203).

Cette affirmation est pour le moins surprenante. Dans l'accord de 1919 il n'y a aucune référence à cette carte. Or le traité ne peut confirmer quelque chose qu'il ne mentionne pas.

D'ailleurs, faut-il le rappeler, cette carte n'était pas annexée à la déclaration de 1899.

Comme mon collègue, M. Sohier, l'a indiqué, cette carte n'établissait d'aucune manière une frontière, et ne pouvait pas l'établir d'autant plus qu'aucune des parties à l'accord n'avait sur ce territoire un droit souverain.

Mais l'imagination de nos honorables contradicteurs déborde de fertilité lorsqu'ils affirment que l'on peut déduire de l'accord de 1919 que, depuis Toummo, la frontière fait un coude pour remonter vers le nord-est et croiser le tropique du Cancer à la longitude du 16° est de Greenwich, c'est-à-dire au point de départ de la limite franco-britannique de 1899 (mémoire du Tchad, p. 201, et contre-mémoire du Tchad, p. 355).

Messieurs de la Cour, j'ai lu et relu à plusieurs reprises cet accord franco-italien de 1919 et je n'ai pas trouvé la moindre indication d'une délimitation de la frontière à l'est de Toummo. Nous ne sommes même pas dans le cas où l'on pourrait dire qu'il n'y a pas lieu d'interpréter un texte lorsque celui-ci est clair, ici il n'y a tout simplement pas de texte à interpréter. La délimitation de la frontière va de Ghadamès à Toummo et elle s'arrête à ce dernier point.

Au-delà de ce point tout est à faire. Le traité même le reconnait en disant :

> "le Gouvernement de Sa Majesté le roi d'Italie et le Gouvernement de la République se sont déjà mis d'accord sur les points suivants, tout en réservant d'autres points pour un prochain examen".

Ces "autres points" concernent forcément la délimitation de la frontière à l'est de Toummo, puisque l'accord n'en souffle mot et que c'est la seule partie qui reste à délimiter; la partie entre Ghadamès et la mer Méditerranée l'ayant été en 1910.

D'après le Gouvernement du Tchad l'accord de 1919, en se plaçant sur le terrain des compensations promises à l'Italie à l'article 13 du traité de Londres, montre que l'Italie reconnaissait en droit le *statu quo* territorial, même si elle le contestait politiquement (mémoire du Tchad, p. 201-202). Cette affirmation n'est guère exacte. L'Italie ne reconnaissait pas le *statu quo* territorial, car elle était l'héritière - et les écritures libyennes l'ont montré - des droits de l'Empire ottoman dans la région. Cela dit, ces droits n'étaient pas clairement établis, ils ne permettaient pas de délimiter une frontière de manière précise. Il existait par conséquent un contentieux territorial entre la France et l'Italie dans la région, comme le reconnaît d'ailleurs l'article 13 du traité de Londres.

En effet, après avoir mentionné le principe de compensations en faveur de l'Italie, il ajoute:

> "notamment dans le règlement en sa faveur des questions concernant les frontières des colonies italiennes de l'Erythrée, de la Somalie et de la Libye et des colonies voisines de la France et de la Grande-Bretagne".

Si des frontières précises avaient existé à l'époque, le traité n'aurait certes pas mentionné "*des questions* concernant les frontières". Il suffisait en effet d'insérer le principe de compensations au regard des frontières. Si le traité cite des "*questions* concernant les frontières" c'est bien que certaines frontières doivent encore être délimitées et qu'il y a incertitude sur les droits des parties dans certaines régions.

L'article 13 du traité de Londres a donc pour but de permettre à l'Italie, lorsqu'une délimitation interviendra, de l'invoquer afin d'obtenir un tracé qui lui soit avantageux et, en cas de doute sur les droits réciproques des parties, que ces droits soient établis en sa faveur. C'est la raison pour laquelle l'Italie, dans les négociations au sein du conseil suprême des alliés et de sa commission, se place sur le plan des compensations. Ces négociations ne consistent d'ailleurs qu'en quatre réunions, exactement le 15, le 19, le 28 et le 30 mai 1919. On voit mal comment, dans un laps de temps aussi bref, les parties se seraient livrées à un examen juridique approfondi de leurs droits respectifs dans la région.

Il s'agit en réalité d'une *négociation politique globale*, le fait que l'Italie ait essayé d'obtenir un mandat sur le Togo le prouve. Or, en se plaçant sur le terrain politique, sur le terrain de l'article 13 du traité de Londres, l'Italie ne renonce à aucun de ses droits et elle ne reconnait juridiquement aucun *statu quo*. Si elle peut arriver à un accord c'est tant mieux, et c'est ce qui se passe avec le traité de 1919 pour le tracé Ghadamès-Toummo, si elle n'y arrive pas c'est tant pis. L'Italie négociera ultérieurement, comme l'indique d'ailleurs le traité de 1919 : "tout en réservant d'autres points pour un prochain examen".

C'est de cette manière que la commission l'a compris puisque dans son rapport, après avoir mentionné le refus italien des propositions françaises relatives à la frontière de la Libye, elle ajoute : "L'Italie entend par là garder la question coloniale africaine ouverte entre elle et la France." (Mémoire de la Libye, "Italian Archives", annexe, p. 28.) Dès lors, dans la mesure où l'article 13 du traité de Londres n'a pas pleinement trouvé application – et le Gouvernement français en est conscient puisqu'une note interne du ministère français des affaires étrangères indique que : "l'Italie pourra toujours invoquer l'article 13

du pacte de Londres, terrain sur lequel il est bien difficile de refuser la conversation" (mémoire du Tchad, annexe 148) - dans la mesure - disais-je - où l'article 13 n'a pas pleinement trouvé application, la situation relative à la frontière sud de la Libye n'a pas été modifiée par le traité de 1919 entre la France et l'Italie. Il n'y avait pas de frontières séparant les deux Etats coloniaux avant 1919, il n'y en a pas plus en 1919. L'Italie et la France gardent chacune leurs éventuels droits dans la région, mais l'Italie possède depuis 1915 un droit de plus : c'est celui qui découle de l'article 13 de l'accord de Londres.

Ainsi donc le traité de septembre 1919 n'a eu pour effet que de délimiter la frontière dans le secteur Ghadamès-Toummo et rien d'autre. Vouloir lui donner une conséquence sur la frontière méridionale c'est forcer la réalité, car il n'y a rien de semblable ni dans le texte, ni dans son contexte, ni dans les circonstances de sa négociation.

Monsieur le Président, Messieurs les juges, si j'ai pu être bref en ce qui concerne l'examen du traité entre la France et l'Italie de 1919, je dois m'étendre devantage sur le traité du 8 septembre 1919 conclu entre l'Angleterre et la France. Curieux traité en effet, puisqu'il porte sur la frontière sud de la Libye et qui, donc, ne pouvait qu'empiéter sur les droits italiens, ou tout au moins sur les droits que l'Italie croyait posséder dans cette région. L'Italie n'était ni associée, ni même informée de l'existence de cet accord, ce qui était - le moins que l'on puisse dire - incorrect, et peu amical, puisqu'elle était directement concernée par son objet. Cela prouve que les deux parties ne devaient pas avoir bonne conscience à l'égard de l'Italie. Drôle de manière d'appliquer l'accord de Londres, étrange "compensation" !

Pour bien comprendre la portée de ce traité, il faut revenir un instant sur la déclaration de 1899. On s'en souvient, d'après son article 2, le tracé de la frontière du territoire français ne pouvait en

aucun cas dépasser à l'est le 23e degré de longitude. Sur ce point la convention de 1919 porte cette frontière jusqu'au 24e degré de longitude. Cette partie de la convention figure maintenant sur l'écran (texte n° 59 du dossier vert)

Son effet géographique apparaît sur la carte n° 58.

Mais il y a plus, Messieurs, l'article 3 de la déclaration de 1899 prévoyait qu'au nord du 15e parallèle, la zone française sera limitée par une ligne qui, partant du point de rencontre du tropique du Cancer avec le 16e degré de longitude, descendra dans la direction sud-est jusqu'à sa rencontre avec le 24e degré de longitude qu'elle suivra jusqu'à sa rencontre au nord du 15e parallèle. Or, d'après la convention de 1919, et sous couvert d'interprétation, cette ligne prendra une direction sud-est jusqu'au 24e degré de longitude au point d'intersection avec le parallèle 19° 30' de latitude. Ce passage du traité apparaît maintenant sur l'écran (texte n° 61 du dossier vert).

La différence entre le parallèle 15° et celui du 19° 30' n'est pas insignifiante. La carte n° 28, qui figure à votre dossier et qui est maintenant sur l'écran, montre la ligne résultant de la déclaration de 1899, celle qui figure sur le *Livre jaune*, et enfin celle de 1919. La différence entre ces lignes est saisissante. Enfin, cette ligne qui en 1899 suivait rigoureusement une orientation sud-est devient en 1919 une ligne est-sud-est.

D'après le Tchad, le tracé résultant de l'accord de 1919 ne diffère pas, ou de très peu, du tracé de celui de 1899. De plus l'accord de 1919 ne ferait qu'interpréter la déclaration de 1899, ce qui résulterait des textes du traité que je viens de vous montrer. Deux affirmations, deux erreurs : une de fait, une de droit.

L'erreur de fait tout d'abord, à savoir que le tracé qui résulterait de la déclaration de 1899 serait identique, ou presque, de celui

résultant du traité de 1919. L'examen de la carte qui est sous vos yeux (carte 28) indique qu'il y a une divergence considérable entre la ligne de 1899 et celle de 1919. Plus concrètement, le nouveau tracé (contre-mémoire libyen, p. 185) a pour effet d'accorder à la France un territoire d'environ 180 000 km^2, ce qui correspond à la surface réunie de la Suisse, de la Hollande, de la Belgique et de l'Autriche. Je veux bien qu'il s'agit de territoires désertiques et que par rapport à l'immensité du continent africain l'étendue des territoires européens cités représente peu de chose. Il n'en reste pas moins vrai qu'il s'agit d'un bien grand morceau de territoire et qu'il est difficile de comprendre comment, en dépit de la vérité la plus élémentaire, le Tchad puisse affirmer que le tracé de 1899 est égal, ou presque, à celui de 1919. Les chiffres sont là, Messieurs.

Le Tchad prétend en outre que le traité de 1919 interprète celui de 1899. Je n'ai rien contre cette affirmation, en ce sens que deux Etats peuvent, sous prétexte d'interprétation authentique, modifier un traité. Mais cela ne vaut évidemment que dans le cas de leurs rapports mutuels. Juridiquement toute l'argumentation est sans valeur lorsqu'on l'applique à des Etats tiers.

Le principe de l'effet relatif des traités, qu'ils soient interprétatifs ou pas, est bien établi en droit international. Il a toujours été reconnu par la doctrine et confirmé par la jurisprudence internationale. Examinant les effets du traité de Paris de 1898, conclu entre l'Espagne et les Etats-Unis, Max Huber, dans sa célèbre sentence arbitrale relative à l'*Ile de Palmas*, affirmait:

> "It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers." (*RSA*, vol. II, p. 842.)

Le principe découle de celui de l'indépendance et de l'égalité des Etats, qui a été si souvent reconnu dans de nombreuses résolutions de l'Assemblée générale des Nations Unies. Ce principe est d'ailleurs réaffirmé à l'article 34 de la convention de Vienne de 1969 sur le droit des traités.

Et s'il est une disposition de cette convention de 1969 qui codifie une règle coutumière c'est bien celle-ci.

La règle de l'effet relatif des traités n'est pas contestée de l'autre côté de la barre; nos collègues, représentant le Gouvernement tchadien, sont bien trop bons juristes. En revanche, ils soutiennent, et sur ce point on ne saurait les suivre, que la délimitation résultant de l'accord de 1919 était opposable à l'Italie, tout en reconnaissant que ce dernier Etat était tiers à l'accord mentionné.

Je m'efforcerai de résumer le plus fidèlement possible leur argumentation. Tout d'abord, cette opposabilité résulterait du fait que le tracé de 1919 était semblable à celui de 1899 reconnu par L'Italie. Or le Gouvernement libyen a fait justice de cette affirmation : les deux tracés diffèrent, je le répète, de manière considérable.

Ensuite, le Gouvernement tchadien soutient que, même si les tracés diffèrent, celui de 1919 n'en serait pas moins opposable à l'Italie. J'ai quelques difficultés sur ce point à suivre le raisonnement de nos adversaires.

Le premier argument découle toujours de la prétendue reconnaissance par l'Italie de l'accord franco-britannique de 1899. Mon collègue Walter Sohier a fait justice de cette affirmation et il n'y a pas lieu d'y revenir.

D'après le deuxième argument, la Turquie n'avait aucun droit souverain en dehors des limites de la Tripolitaine, elle ne pouvait donc transférer à l'Italie des droits qu'elle n'avait pas (réplique du Tchad, p. 59).

La Libye a soutenu à diverses reprises, et le montrera à nouveau, que la Sublime Porte avait à l'époque des droits qui dépassaient les limites de la Tripolitaine. Mais, de toute manière, si la Cour - comme nous le pensons - arrivera à la conclusion que le traité de 1955 entre la Libye et la France n'a pas délimité la frontière sud de la Libye, il lui

appartiendra, dans sa tâche de délimitation, de déterminer l'existence des droits de la Turquie dans la région. Le Gouvernement tchadien reconnaît d'ailleurs l'existence d'une présence ottomane en 1908 (réplique du Tchad, p. 64) et il est un fait qu'à cette date les troupes françaises ne s'y trouvaient pas.

Messieurs les Membres de la Cour, il est indubitable - et on ne le conteste pas de l'autre côté de la barre (réplique du Tchad, p. 59) - que par le traité d'Ouchy des 15 et 18 octobre 1912, l'Italie succédait à la Turquie en ce qui concerne ses droits territoriaux sur le territoire qui allait devenir la Libye. Sans doute les droits turcs, n'étant pas toujours précis, peuvent prêter à discussion, à négociation, mais ce qui est certain c'est que ni la France ni l'Angleterre ne pouvaient en 1919, par un accord entre elles, disposer des droits que l'Italie possédait en tant qu'Etat successeur. D'aucune manière le traité de 1919 ne pouvait être opposable à l'Italie qui l'ignorait et qui, dès qu'elle en aura eu connaissance, n'aura cesse de le rejeter.

Conscient probablement de la faiblesse de sa thèse, le Gouvernement du Tchad en a développé une nouvelle dans sa réplique (p. 59). D'après elle, l'article 16 du traité de Lausanne de 1923 aurait consacré la renonciation par la Turquie à tous droits et titres de quelque nature que ce soit, sur ou concernant les territoires situés au-delà des frontières prévues par ce traité. Toujours d'après le Tchad:

> "Cette renonciation n'est pas adressée à la seule Italie; elle l'est aussi à l'Empire britannique et à la France, également parties au traité. Il faut en déduire que les droits improbables de la Turquie sur les territoires occupés par la France sont, en tout état de cause, éteints, exactement au même titre que ceux qu'elle pouvait avoir sur les colonies britanniques ou italiennes - dont, dans ce dernier cas, la Libye" (réplique du Tchad, p. 59, par. 2.60),

et la réplique ajoute que le traité de 1912, mettant fin à la guerre entre l'Italie et la Turquie, était à l'égard de la France et de l'Angleterre *res inter alios acta*, il n'en résulterait aucune obligation à l'égard de ces deux pays.

Même s'il était supporté par deux béquilles, cet argument ne tient pas debout. Tout d'abord il n'est pas contestable que le traité d'Ouchy de 1912 ait eu pour effet de transférer à l'Italie la souveraineté de la Turquie sur la Libye, même si la frontière de ce territoire n'était pas entièrement délimitée. Non seulement la communauté internationale de l'époque en a pris acte, mais la France puis l'Angleterre l'ont reconnu expressément. La première par une déclaration unilatérale du 20 octobre 1912, formulée sans aucune réserve, puis par l'accord avec l'Italie du 28 octobre 1912 (mémoire de la Libye, "International Accords and Agreements", annexe n° 11).

Les deux Etats, France et Angleterre, reviennent sur cette reconnaissance par l'article 10 de l'Accord de Londres de 1915, qui dit:

> "L'Italie sera substituée en Libye aux droits et privilèges appartenant actuellement au Sultan en vertu du traité de Lausanne." (Mémoire de la Libye, *ibid.*, annexe 2 n° 12.)

La reconnaissance par ces deux Etats des droits italiens sur la Libye découlant du traité de 1912 est donc claire et inconditionnelle; il est pour le moins extraordinaire que le Tchad soutienne aujourd'hui que cet accord était *res inter alios acta* par rapport à l'Angleterre et la France.

Pour terminer cet aspect du problème, je voudrais indiquer que l'interprétation du Tchad de l'article 16 du traité de Lausanne de 1923 est erronée. Car l'article 16, je l'ai déjà dit, prévoit:

> "La Turquie déclare renoncer à tous droits et titres de quelque nature que ce soit, sur ou concernant les territoires situés au-delà des frontières prévues par le présent traité."

Mais quelles sont les frontières prévues par le présent traité ? Il s'agit des frontières prévues à l'article 2 qui concernent : la Bulgarie et la Grèce, à l'article 3 qui concernent la Syrie et l'Irak; ainsi que la cession d'îles en faveur de la Grèce (art. 12) et de l'Italie (art. 15).

La renonciation de tous les droits et titres de la part de la Turquie, étant donné la position de l'article 16 dans le contexte du traité, ne peut viser que ces territoires. Il n'y a là, Messieurs les Juges, aucun mot sur la Libye. Cela va de soi, la souveraineté turque ayant été transférée à l'Italie en 1912, la Turquie ne pouvait pas renoncer à des droits qu'elle n'avait plus depuis dix ans.

En continuant l'examen du traité de 1923, nous voyons qu'il contient à son article 22 une disposition relative à la Libye, qu'il convient de lire en liaison avec l'article 10 de l'accord de Londres de 1915. Par ce dernier, on l'a vu, l'Italie sera substituée en Libye aux droits et privilèges appartenant *actuellement* au Sultan en vertu du traité d'Ouchy de 1912.

Ce qui est certain c'est donc qu'en 1915 l'Angleterre et la France acceptent que *tous* les droits de l'Empire Ottoman sur la Libye passent à l'Italie. Il n'y a plus aucune réserve. On est loin de l'interprétation du Tchad.

Cependant, l'on est en droit de se demander ce que les termes "droits et privilèges appartenant actuellement au Sultan" voulaient dire en 1915, alors que l'Italie avait succédé en Libye à l'Empire ottoman en 1912. La réponse est simple, le mémoire libyen et mon collègue le professeur Condorelli l'ont montré : le traité de 1912 accordait au Sultan certains privilèges. Il gardait par exemple un représentant personnel et une autorité en matière religieuse en ce qui concernait les musulmans. En vertu du traité de 1915 les droits passent à l'Italie, cependant - cela est évident - le traité de Londres n'était pas opposable à la Turquie. D'où l'article 22 du traité de Lausanne de 1923:

"la Turquie déclare reconnaître l'abolition définitive de tous droits et privilèges de quelque nature que ce soit dont elle jouissait en Libye en vertu du traité de Lausanne du 18 octobre 1912".

Cette disposition, on le voit, vise la reconnaissance du transfert à l'Italie des droits résiduels que la Turquie possédait encore en Libye en vertu du traité de 1912. Quant à la France et à l'Angleterre, elles avaient déjà reconnu un tel transfert en 1915. Ainsi, l'examen des textes pertinents montre le caractère artificiel de la construction juridique tchadienne.

Que ce soit en 1919, comme en 1923, l'Italie possédait tous les titres juridiques hérités de la Turquie, elle était donc juridiquement fondée à protester contre ce traité franco-britannique de 1919 qui empiétait sur ses prétentions. Elle protestera d'ailleurs à plusieurs reprises, comme nous allons le voir.

Je tiens à le souligner, Messieurs de la Cour, et le Tchad l'admet (mémoire du Tchad, p. 190, par. 182), cette opposition italienne à l'accord de 1919 a été renouvelée constamment jusqu'à la conclusion, en 1935, de l'accord Laval-Mussolini.

Cette attitude est symptomatique: aucun Etat, aucun gouvernement ne protesterait pendant une durée de quatorze ans contre un accord, qui en vertu de l'effet relatif des traités ne lui est pas opposable, s'il n'était pas convaincu de son bon droit. Ce bon droit peut découler de l'une ou de l'autre raison suivante :

1) en premier lieu, l'Italie n'a jamais reconnu la ligne de 1899 que la France s'engageait à ne pas dépasser;

2) même si tel était le cas, l'accord de 1919 diffère profondément de celui de 1899.

Je pense que pour mieux apprécier la valeur de ces protestations, il convient d'examiner le raisonnement du Gouvernement italien tel qu'il résulte de ses notes de protestation.

Dès le début, la première note du Gouvernement italien adressée au Gouvernement français, du 12 décembre 1921, est très claire; après avoir montré que la ligne de 1919 est différente de celle de 1899, elle ajoute :

> "Il résulte de ce qui précède que le Gouvernement royal se trouve dans l'impossibilité de reconnaître la convention anglo-française de 1919." (Mémoire du Tchad, annexes 98/99.)

La note italienne de protestation adressée au Gouvernement anglais du 10 décembre 1921 était rédigée plus ou moins dans les mêmes termes (mémoire de la Libye, "British Archives", annexe, p. 137).

Le constat de la différence entre la ligne de 1899 et celle de 1919 est réaffirmé dans une nouvelle note italienne adressée au Gouvernement français le 27 mars 1924 (mémoire du Tchad, annexe 104). Cette dernière va cependant plus loin du fait que la convention de 1919 employait le terme de *frontière*.

Le Tchad fait grand cas de l'emploi de ce terme dans la convention. D'après lui, si la déclaration de 1899 se bornait à délimiter des zones d'influence, la convention de 1919 consolide la ligne prévue en une véritable délimitation de frontière (mémoire du Tchad, p. 193).

Il en résulte que cette soi-disant interprétation authentique de 1919 de la déclaration de 1899 a pour effet non seulement de modifier le tracé de la ligne indiquée, mais encore de modifier la nature de cette ligne. En 1899 deux Etats se reconnaissent des aspirations territoriales, et rien de plus; en 1919, toujours d'après le Tchad, ces deux Etats établissent un véritable partage territorial au dépens de l'Italie, Etat tiers à cet accord. Et l'on voudrait aujourd'hui que ce changement territorial et ce changement de la nature de la ligne de 1899 soit opposable à l'Italie. Cette dernière a tout de suite vu le piège. Dans sa note diplomatique du 27 mars 1924, elle faisait valoir :

> "La déclaration du 21 mars 1899 représentait un simple partage de zones d'influence, tandis que la convention de 1919 est une véritable délimitation de frontière. L'esprit des deux documents diplomatiques est donc différent et on doit reconnaître que la convention de 1919 a foncièrement modifié le *statu quo* créé par la déclaration de 1899,
>
> ...
>
> Le Gouvernement italien se considère partant en plein droit, pour ce qui le concerne, de ne pas reconnaître l'existence de la convention du 8 septembre 1919." (Mémoire du Tchad, annexe 105.)

Il me semble donc qu'il ne saurait y avoir aucun doute possible sur le fait que l'Italie n'a reconnu ni le changement du tracé de la ligne, ni la transformation de cette ligne en frontière. Toutes les affirmations du Tchad tendant à montrer que le tracé de 1919 est opposable à l'Italie se heurtent à la réalité des faits.

Dès lors, le Gouvernement du Tchad ne peut invoquer la prétendue adhésion de l'Italie à la ligne découlant de la déclaration de 1899 comme ayant pour conséquence l'opposabilité de la ligne de 1919, puisque celle-ci en modifie le tracé et la nature même.

L'argument d'après lequel la convention de 1919 ne modifie pas la déclaration de 1899, mais qu'elle l'interprète dans le sens de

l'intention originaire des parties (mémoire du Tchad, p. 194) est également dépourvu de valeur.

L'Italie n'avait pas à se soucier de l'intention des parties au regard de la déclaration de 1899, intention qu'elle ne pouvait évidemment pas connaître n'ayant pas participé à sa négociation. Seul le texte de cette déclaration pouvait la concerner, mais celui-ci, quoiqu'on en dise, ne laissait en rien prévoir le texte de la convention de 1919, qui - on l'a vu - s'en écarte et reste de ce fait pour l'Italie *res inter alios acta*.

Le point de vue italien sera répété à plusieurs reprises, notamment lors des incursions militaires françaises dans le Tibesti. Dans sa note de protestation du 19 mai 1930 (mémoire du Tchad, annexe 125) le Gouvernement italien rappelait au Gouvernement français que ce dernier avait reconnu, en 1902, que la déclaration de 1899 entre la France et l'Angleterre marquait pour la zone d'influence française par rapport à la Tripolitaine et à la Cyrénaïque une limite que le Gouvernement de la République n'avait pas l'intention de dépasser. Cette note revenait sur le fait que l'Italie n'avait jamais reconnu la convention du 8 septembre 1919, car elle avait profondément modifié la déclaration de 1899 aussi bien dans son contenu juridique que dans son contenu territorial. Et la note d'ajouter:

> "Cette précision est faite sans aucun préjudice des droits qui découlent en faveur de l'Italie de l'article 13 du pacte de Londres de 1915."

Ainsi, au fil des années, la position italienne a été constante : la convention du 8 septembre 1919 ne lui est pas opposable.

Que répond à cela la France ? Vous ne serez pas étonnés, Messieurs de la Cour, de constater que la thèse française correspond dans les grandes lignes à celle du Tchad, exposée aujourd'hui devant vous. Aux

nombreuses notes diplomatiques italiennes répondent de nombreuses notes diplomatiques françaises.

La thèse française est bien exposée dans la note du 7 février 1923 (mémoire du Tchad, annexe 102). Elle se réfère d'abord à l'échange de lettres du 1er novembre 1902, qui indique

> "que par la limite de l'expansion française ... on entend bien la frontière de la Tripolitaine indiquée par la carte annexée à la déclaration du 21 mars 1899, additionnelle à la convention franco-anglaise du 14 juin 1898".

De plus, toujours d'après le Gouvernement français, le tracé de la ligne nord-est est indiqué en pointillé, ce qui montre que cette ligne n'était pas définitive. Ceci est d'autant plus vrai que le paragraphe 3 de la déclaration de 1899, avant de décrire la ligne, disait : "Il est entendu en principe."

Toujours d'après le Gouvernement français, la convention de 1919 n'a en rien modifié les dispositions de la convention de 1899, ce qui résulte de son dernier paragraphe qui le dit expressément. Et après avoir analysé la nouvelle ligne, la note ajoute :

> "Cette interprétation, si voisine du traité provisoire de la carte de 1899, élargit légèrement la zone d'influence française au préjudice du domaine anglo-égyptien. Mais l'esprit de la déclaration de Londres est respecté et son texte faisait déjà prévoir cette interprétation."

Retenons, Messieurs, que cette note reconnaît l'élargissement même si *léger* de la zone d'influence française. Mais, dans sa note du 21 juin 1924 (mémoire du Tchad, annexe 107) le Gouvernement français rejettera l'argument italien d'après lequel cet accroissement territorial léger en faveur de la France est d'environ 180 000 km^2.

"Quelques centaines de kilomètres carrés tout au plus" dit la note française. Dans sa note du 5 mars 1930 (mémoire de la Libye, "Italian Archives" annexe, p. 70), le Gouvernement français affirmera:

"la ligne qui, à l'est de Toummo, marque la limite des possessions françaises est la ligne définie par l'accord franco-britannique du 9 septembre 1919 portant interprétation de la déclaration franco-britannique du 21 mars 1899, reconnue par l'Italie en vertu de l'accord franco-britannique du 1er novembre 1902".

Jusqu'ici il y a une certaine consistance dans la position de la France même si elle est juridiquement mal fondée. Mais voilà que trois mois plus tard le Gouvernement français change son fusil d'épaule. Cela résulte de la note du 25 juin 1930 (mémoire du Tchad, annexe 127).

D'après celle-ci, l'accord de 1902 entre la France et l'Italie précisait que le territoire interdit à l'expansion française était délimité par la frontière de la Tripolitaine, indiquée par la carte annexée à la déclaration de 1899. Et la note ajoute :

> "Or, l'examen de ladite carte révèle que le territoire en question à partir de Toummo remonte vers le nord-est jusqu'aux environs du 25e degré de latitude nord pour se diriger ensuite franchement au nord. La ligne définie par l'article 3 de la déclaration franco-anglaise de 1899 rencontre cette frontière à son intersection avec le tropique du Cancer mais elle ne la traverse pas, en sorte que les territoires qu'elle partage entre la France et l'Angleterre sont situés entièrement en dehors de la zone réservée à l'Italie."

Il en résulte que le tracé découlant de l'accord de 1919 ne pouvait léser aucun droit italien.

Et voilà, Messieurs, cette ligne que l'on a voulu opposable à l'Italie en vertu de l'accord de 1902 - cette ligne disais-je - a disparu, elle n'a plus aucune importance car de toute manière elle se situe en dehors de la zone réservée à l'Italie. C'est un véritable tour de prestidigitateur qu'il conviendrait d'applaudir.

De toute manière, il est certain que la position française est fluctuante. J'en vois la preuve dans une lettre du 7 août 1928 (mémoire de la Libye, "French Archives", annexe, p. 360) de M. de Beaumarchais, ambassadeur de France à Rome, adressée au ministre français des affaires étrangères Briand, dans laquelle l'ambassadeur relate un entretien qu'il a eu avec Mussolini au sujet de négociations portant, entre autres, sur la frontière libyenne. M. de Beaumarchais propose que l'oasis de Djado soit incorporée dans le territoire libyen, mais à deux conditions :

1) que l'Italie reconnaisse que la France a satisfait aux exigences du traité de Londres de 1915; et

2) que l'Italie reconnaisse l'accord de 1899 relatif aux frontières de la Tripolitaine. Enfin l'ambassadeur ajoutait qu'il avait indiqué à Mussolini : "il était nécessaire de déterminer d'une façon définitive les

frontières de nos possessions respectives".

On croit rêver. La France qui a soutenu dans diverses notes diplomatiques que l'Italie avait reconnu le soi-disant partage d'influence entre la France et l'Angleterre, la voilà en train de demander cette reconnaissance, et non pas de l'accord de 1919 - ce qui aurait été normal puisque l'Italie ne l'avait jamais reconnu - mais de celui de 1899. Et il ne s'agit pas ici d'une quelconque note administrative interne française, mais d'une démarche officielle de l'ambassadeur de France au chef de l'Etat italien. Vouloir nous dire aujourd'hui, comme le fait le Tchad, que la position française était constante et que cette fameuse ligne de 1899 a été opposable à l'Italie depuis 1902, c'est vouloir déformer la réalité.

Mais, indépendamment de ces changements répétés dans la position française, il convient de rejeter l'argument d'après lequel le traité de 1919, prenant sa source dans celui de 1899, se situait entièrement en dehors de la zone réservée à l'Italie. Car de deux choses l'une. Ou bien l'accord de 1902 visait à la fois la Tripolitaine et la ligne découlant de l'accord de 1899, ou bien il ne visait que la Tripolitaine. Dans le premier cas, il va sans dire que la ligne découlant du traité de 1919 empiétait sur les droits de l'Italie, puisque son tracé était modifié en défaveur de cet Etat, et en plus en modifiait la nature. Ou bien l'accord de 1902 ne visait que la Tripolitaine, mais dans ce cas la thèse française ignore que, depuis 1912, l'Italie a succédé à la Sublime Porte dans la région dans tous ses droits. Succession reconnue par la France en 1912 et par la France et l'Angleterre dans le traité de 1915.

On peut dire ce que l'on veut, mais l'on n'échappe pas à cette alternative. Selon que l'on choisisse l'une ou l'autre solution, on arrive toujours à la conclusion que l'accord de 1919 touchait aux droits

de l'Italie et que l'Italie était donc fondée dans ses protestations et dans son refus de le reconnaître.

Monsieur le Président, Messieurs les juges, dans ses écritures la Libye a montré des divergences profondes entre l'attitude anglaise et celle de la France face aux protestations italiennes formulées à la suite de l'accord de 1919.

Quant au Tchad, il s'est efforcé de les minimiser pour arriver à la conclusion que la position de ces deux Etats était en réalité commune. Pourtant, les faits sont les faits et la divergence existe comme je le soulignerai maintenant en analysant la position anglaise.

L'Italie adressait le 10 décembre 1921 au Gouvernement anglais, je viens de l'indiquer, une note de protestation indiquant qu'elle ne pouvait pas reconnaître l'accord de 1919 pour les mêmes raisons contenues dans la note adressée au Gouvernement français le 12 décembre 1921, et que je viens d'analyser.

Contrairement à la France, l'Angleterre est beaucoup moins sûre de son bon droit en ce qui concerne l'accord de 1919. Vous trouverez d'ailleurs dans les annexes au mémoire libyen ("British Archives", annexe, p. 138-149) des notes internes anglaises qui examinent le problème. Dès le début (p. 138) il est dit :

> "In this long and very complicated note the Italian Ambassador has put his finger on a certain discrepancy between our conventions with the French of March 21st, 1899, and September 8th, 1919 relating to the frontier between British and French possessions in North-East Africa."

A la page suivante, cette note reconnaît qu'au moment de la négociation du traité de 1919 on ne sait pas si l'on a tenu compte de ses effets sur le territoire italien, mais l'on admet que le traité avait pour effet d'étendre les territoires français dans la région. Et la note ajoute :

> "On the other hand we are parties to the Anglo-French convention and as such the Italians have a right to protest to us."
>
> .....

Le premier argument est conforme au principe d'après lequel deux Etats ne sauraient se partager un territoire sur lequel ils n'ont aucun droit. N'oublions pas qu'en 1899 ni l'Angleterre ni la France ne sont présentes dans la région.

Le deuxième argument est conforme aux principes du droit international le moins contesté, à savoir le principe de l'effet relatif des traités et le principe de la succession d'Etat en matière territoriale.

En revanche, l'interprétation tchadienne est le résultat d'une véritable acrobatie juridique. D'après elle, puisque l'Italie avait reconnu en 1902 le partage de 1899 en zones politiques d'influence, elle doit reconnaître en 1919 : *a)* une véritable délimitation frontalière qui était la conséquence logique de ce partage politique; *b)* un changement du tracé de la ligne de 1899, puisque celui-ci était incertain.

Je l'ai dit et je le répète : admettre la thèse de nos honorables contradicteurs c'est aller à l'encontre du principe de l'effet relatif des traités. L'accepter c'est abandonner l'une des règles les plus solides du droit international.

Ainsi je crois avoir démontré que le traité du 8 septembre 1919 entre la France et l'Angleterre n'a pas eu pour effet d'établir une frontière opposable à l'Italie. En 1919, comme auparavant, la situation n'a pas changé, il n'y a toujours pas de délimitation frontalière dans la région : question qui fait l'objet du différend qui vous est soumis.

Je ne m'arrêterai que brièvement sur l'accord de 1924 entre l'Angleterre et la France et celui de 1934 entre l'Angleterre et l'Italie. Que se passe-t-il en 1924 ? Conformément à la déclaration de 1899, une commission anglo-française a eu pour tâche de délimiter sur le terrain la frontière entre l'Afrique équatoriale française et le

Soudan anglo-égyptien, en se conformant aux indications données au paragraphe 2 de cette déclaration modifiée par la convention de 1919. L'accord du 10 janvier 1924 prend acte des travaux de cette commission. Or, si celle-ci avait suivi les indications contenues au paragraphe 2 de la déclaration de 1899, la démarcation de la frontière aurait dû s'arrêter au point de latitude 15° 45' avec le 24° de longitude est.

Mais les travaux de la commission ont été poursuivis bien au delà puisque, d'après l'accord de 1924 (section VIII, alinéa g), annexe 10 du mémoire du Tchad) :

> "A partir de l'intersection de l'oued avec le méridien 24°, la frontière suit le méridien 24° en direction du nord, jusqu'à sa rencontre avec le parallèle 19° 30' nord."

Ainsi le méridien 24° qui devait être une limite de la zone politique française devient une véritable frontière et, conformément ainsi à l'accord de 1919, le point d'arrivée de la ligne qui part du tropique du Cancer est fixé au parallèle 19° 30', ce qui, nous l'avons déjà vu, empiétait largement sur les droits que l'Italie prétendait avoir dans la région.

On ne s'étonnera donc pas que l'Italie, dans une note diplomatique au Gouvernement anglais du 28 février 1924, proteste et contre le traité de 1919 et contre cette démarcation de la frontière (mémoire de la Libye, "British Archives", annexe, p. 180).

A première vue, il y a certainement une contradiction entre la position anglaise exprimée à l'Italie dans sa note diplomatique de 1923, d'après laquelle l'accord de 1919 ne saurait en rien toucher aux droits de cette dernière dans la région, et cet accord de 1924. Les raisons de cette contradiction nous échappent, Messieurs de la Cour, mais cette contradiction n'a guère de conséquence au point de vue juridique.

Sur le plan des relations internationales, au regard de l'Italie, seule compte l'attitude anglaise à son égard, à savoir que les accords de l'Angleterre avec la France ne sauraient porter atteinte aux droits de l'Italie dans la région. De toute manière, l'accord de 1924, comme celui de 1919, en vertu du principe de l'effet relatif des traités, ne lui est pas opposable et cela d'autant plus que l'Italie proteste.

Ainsi, la France et l'Angleterre peuvent délimiter, démarquer toutes les frontières qu'elles désirent, ces actes sont dépourvus de valeur juridique dès lors qu'ils empiètent sur les droits d'un autre Etat. D'ailleurs, la démarcation s'est arrêtée au parallèle 19° 30' et ne se poursuit pas vers l'ouest, ce qui montre que dans l'esprit de la France et de l'Angleterre ce segment ne constituait pas une frontière.

Le traité du 20 juillet 1934 entre l'Angleterre, l'Egypte et l'Italie a pour but de délimiter la frontière entre le Soudan et la Libye et a pour objet de préciser que le triangle de Sarra appartient à la Libye. Les négociations qui ont précédé cet accord ont été exposées en détail dans le mémoire libyen (p. 303-314), et il n'y a pas lieu d'y revenir. Elles montrent que l'Angleterre reconnaissait qu'en 1899 et 1919 il n'y avait entre elle et la France qu'une délimitation de zones d'influence et que l'Italie se posait comme Etat successeur des droits de la Turquie. Mais ce qui me semble plus important encore c'est le texte même du traité.

> "Partant du point d'intersection du 25e méridien est de Greenwich et du 22e parallèle nord, la ligne frontière suit la ligne du 25e méridien, en direction sud, jusqu'à son intersection avec le 20e parallèle nord; de ce point, elle suit le 20e parallèle nord en direction ouest jusqu'à son intersection avec le 24e méridien est de Greenwich; de ce point, elle suit le 24e méridien est de Greenwich en direction sud jusqu'à sa jonction avec la frontière des possessions françaises." (Mémoire de la Libye, "International Accords and Agreements", annexe 24.)

Cette disposition du traité doit être lue en liaison avec un passage du communiqué officiel des trois gouvernements qui apparaît maintenant sur l'écran (n° 62 du dossier vert). J'attire votre attention sur les termes "still to be fixed", ce qui montre que dans l'esprit de ces gouvernements la ligne frontière avec les possessions françaises doit encore être délimitée.

Mais un des signataires n'est pas n'importe qui. Il s'agit du Gouvernement anglais lié par les accords de 1919 et de 1924 avec la France.

En s'exprimant comme il le fait, en concluant le traité de 1934, le Gouvernement anglais montre une fois de plus qu'il n'a jamais voulu empiéter sur les éventuels droits italiens. La limite des possessions françaises est indéterminée. Elle devrait se situer, d'après le traité, quelque part le long du 24e méridien en direction sud. Mais où ? Mystère.

Dès lors, tout au moins d'après l'historique de la question, trois points sont possibles tout au long du 24e méridien. Soit celui de la jonction au parallèle 19° 30'. Mais sûrement pas pour l'Italie, qui a formulé des protestations à l'égard de l'accord de 1919. Soit celui résultant du livre jaune, à savoir 19°, ou enfin le tracé de la zone politique d'influence de 1899, qui mène au parallèle 15° 35'. Mais d'autres lignes sont possibles compte tenu des droits de la Turquie dans la région.

Messieurs de la Cour, il y a sans doute une certaine incohérence dans les positions anglaise et française en ce qui concerne une éventuelle délimitation des possessions entre la France et l'Angleterre dans la région. Mon but ici est simplement de vous montrer que ces incohérences ne peuvent s'expliquer que par le fait qu'il n'y avait pas de délimitation et que, si l'Angleterre et la France, à travers les accords de 1919 et 1924 avaient voulu y parvenir, cette délimitation n'était pas opposable à l'Italie. L'accord de 1934 en est une preuve supplémentaire.

L'examen de la période qui va de 1919 à 1934 montre que la situation juridique au regard de la délimitation de la frontière entre la France et

l'Italie dans la zone en question, à travers les deux traités de 1919, ceux de 1924 et de 1934, est restée sans effet. Il n'y avait pas de frontière en 1919, il n'y en a toujours pas en 1934.

Vous avez maintenant sous les yeux une carte géographique (carte n° 63 du dossier vert) qui montre, en 1934, les frontières résultant des règlements conventionnels. A l'ouest, la frontière est délimitée jusqu'à Toummo ainsi qu'à l'est entre l'Italie, l'Egypte et le Soudan. Tout reste à faire au sud entre l'Italie et la France.

Monsieur le Président, Messieurs les juges, il me resterait à examiner les négociations franco-italiennes qui ont abouti à la conclusion du traité de 1935, elles ont été examinées en détail dans les écritures libyennes et, ne voulant pas alourdir mon exposé, je me permets très respectueusement de vous y renvoyer (mémoire de la Libye, p. 280-302 et 314-323).

Je vous remercie, Messieurs de la Cour, de votre attention et je vous prie de donner la parole à mon collègue M. Condorelli peut-être après l'interruption de la matinée.

The PRESIDENT: Thank you very much Professor Cahier. I think perhaps it would be convenient to take our break now and then Professor Condorelli can occupy the whole of the time afterwards. Thank you very much.

L'audience est suspendue de 11 h 10 à 11 h 30.

Le PRESIDENT: Professor Condorelli.

M. CONDORELLI :

Introduction

Monsieur le Président, Messieurs les juges, en reprenant la parole devant vous, je voudrais commencer par vous annoncer les thèmes sur lesquels portera ma plaidoirie d'aujourd'hui.

Dans une première partie, j'ai l'intention, avec votre permission, d'interrompre pendant un court moment la séquence historique des événements : je voudrais m'arrêter sur les cartes géographiques de source italienne représentant la Libye. Mon but est d'étudier s'il est vrai, comme le Tchad le prétend, que ces cartes confirmeraient l'acceptation par l'Italie de la ligne de 1899 ou de celle de 1919 en tant que frontière méridionale de la Libye, ou si par hasard ces cartes ne prouvent pas exactement le contraire.

Après cette étude de cartes, dans ma deuxième partie je reprendrai le fil de l'histoire du différend au point précis où le professeur Cahier s'est arrêté dans sa plaidoirie d'il y a un moment. Ma tâche sera ici de présenter à la Cour les accords de Rome du 7 janvier 1935, dans le but de démontrer que, même si le traité de 1935 n'est finalement pas entré en vigueur à cause du défaut d'échange des ratifications, les accords Mussolini-Laval prouvent de la façon la plus claire et la plus décisive qui soit une conclusion qui, par ailleurs, s'imposait déjà au vu de toutes les preuves fournies par l'étude des événements antérieurs : à savoir qu'avant 1935 aucune frontière n'avait été délimitée afin de séparer les possessions française et italienne à l'est de Toummo.

Après cela, dans la troisième partie de mon intervention, j'examinerai quelques-uns des événements postérieurs à 1935, afin de montrer que la pratique subséquente des parties confirme ultérieurement l'absence de frontière dans la région en question.

Enfin, dans la quatrième et dernière partie, je me pencherai sur le traité de paix de 1947, dont il s'agira d'étudier les effets par rapport au présent différend.

PREMIERE PARTIE

LES CARTES ITALIENNES

1. A propos de la thèse du Tchad d'après laquelle l'Italie aurait fait sienne la carte figurant dans le *Livre jaune*

Monsieur le Président, Messieurs les juges, dans les précédentes plaidoiries, la Libye a démontré que l'Italie n'a jamais reconnu ni la ligne figurant dans la carte publiée dans le *Livre jaune* de 1899, ni celle de la convention franco-anglaise de 1919, et n'a jamais accepté, en particulier, de considérer l'une de ces lignes en tant que frontière méridionale de la Libye. Cette démonstration maintenant, avec votre permission, va être complétée à travers l'étude des cartes d'origine italienne, qui en confirment harmonieusement les résultats.

A vrai dire, dans sa réplique, la Partie tchadienne prétend le contraire. Sa thèse est que l'Italie, après 1902, aurait elle-même adopté la carte du *Livre jaune* et s'en serait servie dans ses diverses négociations avec la Grande-Bretagne; ceci tout en étant parfaitement consciente que la carte en question n'avait pas été annexée à la déclaration de 1899.

Mais voyons sur quoi une telle thèse prend appui. A la page 55 de sa réplique le Tchad fait figurer une carte que vous verrez apparaître maintenant à l'écran. Il s'agit apparemment d'un extrait partiel de la carte du *Livre jaune*, sauf que l'encart identifiant les diverses lignes a disparu et que des mots en italien - que vous pouvez voir maintenant - ont été rajoutés à deux endroits, en particulier pour ce qui est de la légende "déclaration franco-anglaise du 21 mars 1899". Cette légende,

vous pouvez le voir, suit la ligne d'est-sud-est qui, tant dans la carte du *Livre jaune* qui apparaîtra maintenant que dans cette carte-ci, indique de façon erronée la ligne de strict sud-est de l'article 3 de la déclaration. Vous pouvez voir donc que c'est bien la même ligne qui apparaît dans les deux cas.

Nous revenons maintenant à la carte qui figure dans la réplique du Tchad. Qu'une carte comporte des mots en italien, voilà qui prouve très peu. Pour en tirer un quelconque indice à l'encontre de l'Italie, il faudrait démontrer qu'il s'agit d'une carte officielle italienne et qu'elle a été utilisée par l'Italie de façon à impliquer la reconnaissance de chacune des lignes qui y sont tracées, notamment de celle qui intéresse le Tchad. Mais nos contradicteurs se gardent bien de démontrer quoi que ce soit à ce sujet.

D'où vient cette carte ? En fait, on n'en sait rien. Le Tchad l'a trouvée annexée à un memorandum du Foreign Office concernant certaines discussions de 1911 entre la Grande-Bretagne et l'Italie au sujet de la frontière entre la Libye et l'Egypte (réplique du Tchad, annexe 23). Dans ce mémorandum il est question d'une note diplomatique italienne, mais on ne dit pas du tout si cette note était ou non accompagnée d'une carte; de toute façon, la note italienne à laquelle on se réfère n'est pas annexée par le Tchad. Mais même si l'on admettait, à de pures fins de discussion, que la carte en question avait été réellement remise par une ambassade d'Italie, il se serait très évidemment agi d'un support utilisé afin d'illustrer la position de l'Italie au sujet d'une frontière qui n'avait rien à voir avec la France, dans le cadre d'une négociation avec un Etat autre que la France. De plus, rien n'est précisé quant à la nature des diverses lignes qui sont tracées sur cette carte.

Messieurs les juges, vous pourriez vous demander pourquoi la Partie tchadienne fait une montagne d'un indice aussi douteux qu'une carte

d'origine incertaine, au contenu ambigu et provenant d'archives d'un pays tiers. Pourquoi le Tchad ne base-t-il pas plutôt son analyse sur les nombreuses cartes italiennes officielles, tout à fait officielles, d'avant et d'après 1912 ? La réponse est simple et elle est accablante pour nos aimables contradicteurs : c'est que toutes les cartes italiennes, sans aucune exception, contredisent radicalement les allégations de la Partie adverse. En effet, tout comme les cartes britanniques qui vous ont été montrées par mon collègue M. Sohier, les cartes italiennes officielles montrent la ligne de l'article 3 de la déclaration de 1899 comme orientée exactement au sud-est (et non pas à l'est-sud-est), et indiquent clairement qu'il ne s'agit nullement d'un tracé de frontière. Dans un instant, j'aurai le plaisir de montrer et de commenter ces cartes, ceci d'autant plus que, curieusement, le Tchad semble en ignorer l'existence.

Mais je le ferai après avoir dit deux mots d'un argument non cartographique, mais connexe, que la répliquue tchadienne voudrait tirer de la réponse à une interrogation parlementaire donnée le 12 décembre 1914 par le sous-secrétaire d'Etat aux colonies, M. Gaetano Mosca, au cours d'une séance du Parlement italien (réplique du Tchad, annexe 28). Il était question de l'appartenance à la France ou à l'Italie d'une oasis près de Ghat, qui avait été occupée par les Français; et, dans les motifs de sa réponse, le représentant du Gouvernement italien faisait effectivement référence, tant à la déclaration franco-anglaise de 1899, qu'à la carte "qui fut rédigée à la suite", afin de justifier le point de vue italien. Voilà qui, d'après le Tchad, prouverait quelle importance l'Italie accordait à la déclaration de 1899.

Franchement, Monsieur le Président, on ne saisit pas très bien la logique de cet argument, qui n'a pas de pertinence par rapport au territoire qui est l'objet du présent différend. D'abord, M. Mosca ne parle pas, n'identifie pas la carte dont il parle. Ensuite, il est tout à fait clair que M. Mosca se réfère à la zone de Ghat, une oasis près de Ghat, or cette zone est à l'ouest de la Libye, du côté algérien, et non pas au sud: la référence à la carte, que ce soit celle du *Livre jaune* ou une autre carte, ne concerne donc que les confins occidentaux de la Tripolitaine, et non pas la frontière méridionale; autrement dit, la ligne dont M. Mosca discute n'est pas celle de l'article 3 de la déclaration de 1899, mais la ligne ondulée entourant la Tripolitaine qui ne forme l'objet d'aucune disposition de la déclaration et qui n'a jamais été une frontière au sens juridique, puisqu'il s'agissait, comme vous l'avez entendu, d'une simple indication de caractère géographique relative à une limite que la France s'était engagée à ne pas dépasser. Il faut rappeler à cet égard qu'un tel engagement ne pouvait pas être explicité par M. Mosca, puisqu'il découlait des accords de 1900-1902 qui à cette époque-là étaient encore secrets : des accords qui, comme la Libye l'a démontré, n'avaient rien à voir avec le sud libyen mais portaient sur l'ouest. Et - souvenons-nous en - en 1912 l'Italie croyait toujours ce que la France lui avait indiqué à tort en 1902 : c'est-à-dire qu'une carte était annexée à la déclaration de 1899 alors que ce n'était pas le cas.

A vrai dire, dans la réplique du Tchad on trouve l'affirmation très curieuse d'après laquelle une phrase de la déclaration du sous-secrétaire d'Etat italien impliquerait la "parfaite connaissance des circonstances dans lesquelles a été établie la carte de 1899" (réplique du Tchad, p. 62, note 6). Mais l'argument n'est pas très sérieux, puisqu'il dépend

d'une mauvaise traduction de l'original italien : M. Mosca avait parlé d'une carte (on ne sait pas si c'est celle du *Livre jaune* ?) en l'indiquant comme rédigée "à la suite" ("in seguito", en italien) de la déclaration de 1899, et non pas "après" cette déclaration, comme le Tchad le prétend (à tort du moins à la page 62 puisque deux pages plus loin, il en donne en fait la bonne traduction). Non pas donc "après" mais "à la suite". Or "à la suite" en anglais "pursuant to", n'implique pas nécessairement une séquence temporelle; en l'espèce, c'est la connexion entre la déclaration et la carte qui est mise en évidence par ces mots: c'est que M. Mosca ne soupçonnait pas du tout que la carte prétendument annexée à la déclaration de 1899 était en fait une belle invention de la diplomatie française!

2. Les cartes italiennes officielles

J'en viens maintenant à la cartographie officielle italienne, qui pourra bien nous éclairer sur les convictions de l'Italie concernant la question de la frontière méridionale de la Libye. Voici apparaître à l'écran la carte de l'Afrique publiée par le ministère des affaires étrangères italien en 1906 (c'est une carte qui figure dans la réplique libyenne et que vous avez dans votre dossier au n° 69) donc quatre ans après l'accord franco-italien de 1902. Plusieurs lignes apparaissant sur cette carte sont identifiées. D'abord la ligne représentant les prétentions ottomanes de 1890. Puis une ligne entourant la Tunisie et qui va jusqu'à Ghadamès (cette ligne s'explique parce que la carte est antérieure de plusieurs années au traité de 1910 relatif à la frontière entre Tunisie et Libye). A l'est est montrée, entre autres, la ligne Butros Ghali-Cromer de 1899, qui sépare l'Egypte du Soudan anglo-égyptien suivant le 22^{e} parallèle. On trouve aussi les lignes de la déclaration

anglo-françaises de 1899 : comme on peut le constater, la ligne de l'article 3 est représentée comme une ligne rigoureusement orientée au sud-est; quant à la ligne de l'article 2, deux parties sont marquées alors que celle entre 11° et 15° degrés de latitude nord est encore à définir.

Vous remarquerez, Messieurs les Juges, que sur cette carte n'apparaît pas la ligne ondulée qui, dans la carte du *Livre jaune*, entoure la Tripolitaine. Le profil général de la Tripolitaine, de la Cyrénaïque et du Fezzan est montré par une couleur jaune, alors que la zone au sud et à l'ouest de la ligne de l'article 3 de la déclaration de 1899 est montrée dans une couleur blanche, avec une légende indiquant en italien: "zone revendiquée par la France et la Turquie".

Monsieur le Président, cette carte démontre à elle seule combien sont erronées les allégations tchadiennes concernant la signification et les effets des accords franco-italiens de 1900-1902. Un coup d'oeil permet de constater visuellement, en premier lieu, qu'en 1906 l'Italie ne reconnaissait pas du tout qu'une frontière de la Tripolitaine avait été établie en 1902. En deuxième lieu, l'Italie relevait que l'*hinterland* tripolitain était toujours l'objet d'un différend entre la Porte et la France, un différend qui était donc à considérer comme encore à régler. En troisième lieu, il est évident qu'en 1906 l'Italie était convaincue que la ligne de l'article 3 est rigoureusement orientée au sud-est, ce qui veut dire que l'Italie n'accordait pas la moindre importance à la ligne d'est-sud-est figurant dans la carte du *Livre jaune*. Enfin, en quatrième lieu, du point de vue italien cette dernière ligne n'était certainement pas censée représenter la délimitation entre les possessions ottomanes et celles de la France, puisque le territoire au sud-est est indiqué comme revendiqué en même temps par les deux pays.

Venons-en maintenant à une seconde carte, qui apparaît à l'écran maintenant : celle publiée par le ministère des affaires étrangères en 1912, que la Libye a fait figurer dans sa réplique et que vous avez dans votre dossier au n° 70. Parmi les lignes tracées en des couleurs différentes, on reconnaît la frontière entre Libye et Tunisie, qui a formé l'objet de l'accord de 1910 et qui arrive jusqu'à Ghadamès. Ici non plus, on ne voit pas la ligne ondulée entourant la Tripolitaine dans la carte du *Livre jaune*. Mais surtout, la ligne de l'article 3 de la déclaration de 1899 est représentée encore une fois comme une ligne de sud-est. Même chose, concernant cette dernière ligne toujours, dans la carte de 1917 du ministère des colonies, que la Libye a reproduite dans sa réplique et que vous pouvez voir en ce moment à l'écran et au n° 71 dans votre dossier.

Monsieur le Président, il est étonnant que, parmi les quelque cent soixante-deux cartes rassemblées dans l'atlas cartographique qui accompagne le contre-mémoire du Tchad, on ne trouve aucune, je dis bien aucune, des cartes officielles italiennes que je viens de montrer, et ceci en dépit du fait que, par exemple, la carte de 1906, la première que je vous ai montrée, soit précisément mentionnée dans des documents produits par les deux Parties dans cette affaire. Encore plus étonnant est que le Tchad - comme on l'a vu - fasse par contre appel à une copie amputée de la carte du *Livre jaune* : une copie de source inconnue, dont la force probatoire dépendrait essentiellement, semble-t-il, du fait que des mots y figurent en italien !

Mais continuons à observer les cartes et regardons maintenant une autre carte officielle qui apparaît à l'écran : c'est celle publiée en 1926 par le ministère des colonies italien (elle figure au n° 72 dans votre dossier). Nous sommes maintenant dix ans plus tard, et la frontière occidentale de la Libye est désormais établie jusqu'à Toummo, puisqu'entretemps l'accord franco-italien de 1919, dont M. Cahier a parlé, est intervenu. Mais à l'est de Toummo, rien n'est indiqué, aucune délimitation n'ayant été tracée précédemment. On remarquera aussi que sur cette carte ne figure plus la ligne de l'article 3 de la déclaration de 1899. Par contre, à l'est de la ligne figure, bien entendu, la frontière avec l'Egypte, qui a été fixée en 1924, deux ans plus tôt donc.

Passons si vous le voulez bien encore à une autre carte : ici, c'est la carte 2 officielle italienne de 1937, qui est reproduite dans le contre-mémoire libyen et au n° 73 de votre dossier. Cette fois-ci on voit figurer la ligne du traité de Rome de 1935, dont je vais discuter tout de suite après. Je me permets d'attirer votre attention sur cette carte, en anticipant quelque peu sur l'exposé suivant, pour compléter l'analyse cartographique sans interruptions, mais aussi pour signaler que ce qu'on voit figurer maintenant à l'écran est bien la seule carte officielle italienne qui figure dans l'atlas cartographique tchadien. Un hasard véritablement extraordinaire a fait en sorte que nos éminents contradicteurs n'ont trouvé dans leurs recherches d'archives que la seule carte italienne officielle qui soit inoffensive pour eux, alors qu'ils ne sont tombés sur aucune de celles qui portent gravement préjudice à leur thèse.

Passons encore aux deux dernières cartes : d'abord celle de 1939, que vous voyez ici et qui correspond à celle publiée dans le contre-mémoire libyen comme carte n° 54, et puis celle de 1941, qui

figure dans votre dossier au n° 74. Je ne crois pas que j'ai besoin de m'arrêter longtemps sur ces deux cartes, puisque à l'instar de la carte de 1926 (que j'ai montrée il y a quelques instants), ces dernières cartes ne comportent aucune ligne à l'est de Toummo : le traité de Rome n'est pas entré en vigueur finalement, donc il était normal d'afficher de nouveau l'absence de toute frontière dans la région.

3. L'incident de la carte scolaire italienne de 1930

Monsieur le Président, Messieurs les juges, j'ai parlé jusqu'à présent des cartes officielles italiennes. Mais il y a encore une carte, quasi officielle celle-ci, mais très intéressante, dont il convient de discuter brièvement : c'est la carte scolaire de 1930, qui fut à l'origine d'un incident diplomatique très instructif entre la France et l'Italie. La voici apparaître à l'écran. L'histoire a été racontée en grand détail dans les écritures libyennes (mémoire de la Libye, par. 5.278-5.279 et cartes n^os 78 et 79; réplique de la Libye, par. 6.200-6.205 et carte LR 16E; réplique de la Libye, vol. II, "Supplementary", annexe 5.10), je n'ai dont pas besoin de faire plus qu'un court rappel.

En bref, le problème est le suivant : en décembre 1930 l'ambassadeur français à Rome avait été informé qu'une carte de l'Afrique utilisée dans les écoles italiennes montrait la Libye comme englobant tant le Tibesti qu'une vaste zone au sud et à l'est de celui-ci : cet effet résultait de la coloration de ladite zone, identique à celle utilisée pour le restant du territoire libyen. Protestation française, et à cette protestation, le Gouvernement italien réagit, suite à un échange très touffu de correspondance entre les divers ministères intéressés, en adoptant la solution de laisser en blanc la zone en question, en reconnaissance du fait que "dans la zone les frontières n'ont pas encore été

internationalement délimitées" (c'est la phrase qu'on trouve dans la dépêche du 22 décembre 1930 du ministère des affaires étrangères, signée par M. Guariglia (réplique de la libye, vol. II, annexe 5.10). Dans la même dépêche, on indique qu'il s'agissait là de la solution qui avait été couramment retenue tant dans les cartes officielles que dans celles de caractère touristique. On comprend en somme, que la France n'avait jamais réagi précédemment contre les cartes indiquant l'absence de frontière dans la zone et que, pour la satisfaire maintenant, on allait modifier la carte scolaire de 1930 afin de confirmer qu'effectivement la frontière n'était toujours pas délimitée. On remarquera que, d'après ce qu'on en sait, la solution adoptée a dû paraître agréable à la France, puisqu'il ne résulte pas qu'il y ait eu de nouvelles protestations.

Monsieur le Président, l'incident de 1930 confirme nettement ce qui se dégage des cartes officielles : l'absence de frontière dans la région formant l'objet du présent différend. De plus, cet accident montre que la France n'avait aucune objection à soulever contre des cartes établissant l'absence de la frontière.

Mais une dernière remarque s'impose au sujet de cet épisode. C'est que la modification de la carte scolaire, telle que décidée au niveau gouvernemental, met bien en évidence l'ampleur de la zone revendiquée par l'Italie. Malheureusement, la Libye n'a pas pu trouver un exemplaire en couleur de la carte telle que modifiée, mais seulement des exemplaires en noir et blanc qui ont été publiés dans le mémoire libyen (cartes n^{os} 78 et 79). Toutefois, on peut aisément supposer que l'effet du blanchissement de la zone, conformément aux instructions du ministère des affaires étrangères, à l'est et au sud de Toummo, qui apparaissait en vert-jaune dans la carte de 1930, comme vous le voyez à l'écran, a dû être celui qui est en train d'apparaître maintenant à l'écran. Superposons maintenant sur cette carte ainsi modifiée la ligne

revendiquée par la Libye devant votre Cour : la voilà apparaître. Il est intéressant de noter combien cette ligne est proche de la marge inférieure de la zone que la carte scolaire de 1930 indiquait comme appartenant à la Libye, et que la carte modifiée par les autorités italiennes indiqua comme revendiquée en même temps par l'Italie et par la France. Je voudrais vous signaler qu'au n° 77 dans votre dossier, figure justement cette carte avec la superposition de la ligne de la revendication libyenne.

4. Conclusion concernant les cartes italiennes

Monsieur le Président, Messieurs les juges, j'en ai terminé avec la première partie de mon exposé : je n'ai qu'à tirer quelques conclusions, des conclusions qui - me semble-t-il - s'imposent.

La première est que aucune des cartes italiennes officielles ou quasi officielles, que ce soit immédiatement après les accords de 1900-1902 ou plus tard, n'indique une quelconque frontière méridionale de la Libye : avec une parfaite cohérence, la cartographie italienne exprime la conviction ferme et constante du Gouvernement italien que la frontière n'a jamais été délimitée dans la région contestée. Seule exception : pendant une courte période le tracé de 1935 a figuré dans les cartes, pour disparaître ensuite lorsqu'il devint clair que le traité Mussolini-Laval n'allait pas entrer en vigueur.

Deuxième conclusion : un certain nombre de cartes italiennes, jusqu'en 1917, montrent effectivement la ligne de l'article 3 de la déclaration de 1899, mais en mettant clairement en exergue que cette ligne ne représentait pas une frontière et qu'elle était orientée rigoureusement au sud-est, et non pas à l'est-sud-est. Aucune, absolument aucune des cartes officielles italiennes ne reproduit la ligne de la carte du *Livre jaune* de 1899 : il est faux, il est absolument faux, que l'Italie aurait "fait sienne" cette carte comme le soutient le Tchad :

Monsieur le Président, je voudrais me permettre de rappeler que dans l'arrêt de 1986, la Chambre de votre Cour qui a réglé le différend frontalier entre Burkina Faso et Mali s'est soigneusement penchée sur la valeur probatoire des cartes, lorsque celles-ci n'ont pas fait l'objet d'un accord précis entre les parties à un différend. La Chambre a remarqué que le poids des cartes en tant qu'élément de preuve peut varier suivant leur fiabilité technique et la neutralité de leur source, mais a souligné qu'il s'agira dans tous les cas de preuves à caractère auxiliaire ou confirmatif : en effet, "les cartes ne peuvent à elles seules être considérées comme des preuves d'une frontière" (*C.I.J. Recueil 1986*, p. 583, par. 56). Dans le sillage de cet enseignement, on devra certainement admettre aussi, et pour les mêmes raisons, que les cartes que je viens de montrer ne peuvent non plus être considérées à elles seules comme des preuves suffisantes pour démontrer l'absence de frontière dans la région contestée. La Libye, d'ailleurs, se garde bien de prétendre une pareille chose, puisqu'elle reconnaît que les cartes italiennes, pour fiables qu'elles soient - et elles le sont - sur le plan technique, ne sont certainement pas neutres : elles traduisent en image cartographique le point de vue italien. Mais c'est justement pour cela, c'est justement parce qu'elles ne sont pas neutres, que les cartes italiennes sont précieuses ici, s'agissant d'identifier avec exactitude la position de l'Italie. En effet, les cartes italiennes officielles, vu leur parfaite cohérence à travers toute la période pertinente, prouvent de façon irréfutable que l'Italie n'a jamais reconnu, ni l'existence d'une frontière dans la région, ni l'orientation est-sud-est de la ligne résultant de l'article 3 de la déclaration de 1899. Autrement dit, ces cartes ne donnent pas la preuve décisive de l'absence de la frontière, mais donnent certainement la preuve décisive que l'Italie n'a jamais reconnu l'existence d'une telle frontière.

DEUXIEME PARTIE

LES ACCORDS DE ROME DE 1935

1. L'importance des accords de Rome

Monsieur le Président, il est temps maintenant que je passe à la deuxième partie de ma plaidoirie d'aujourd'hui, portant sur les accords de Rome de 1935. Les écritures des Parties révèlent un désaccord fondamental à l'égard de la signification de ces accords et de leur impact sur le règlement du présent différend. Sur un point, ce n'est déjà pas mal, il y a pleine identité de vues cependant : ces accords ont une importance capitale parce que leur texte, leur contexte ainsi que les circonstances dans lesquelles ils ont été conclus révèlent au grand jour comment les parties percevaient en 1935 la situation existant dans la région en question, pour ce qui est de l'état des frontières. Une telle importance n'est certes pas amoindrie par le fait que les ratifications ne furent pas échangées : elle en est, en revanche, énormément rehaussée.

Il est évident, en effet, qu'il ne servirait absolument à rien de s'interroger maintenant sur la question de savoir quel était l'état des frontières avant 1935, si le "traité africain" - comme on l'appela - était entré en vigueur et avait de ce fait réglé le différend. C'est justement parce qu'il n'en a pas été ainsi que l'étude des accords de 1935 révèle une utilité exceptionnelle : cette étude permet de comprendre si en 1935 la France et l'Italie ont considéré qu'elles déplaçaient une frontière préexistante, ou si, au contraire, les deux pays ont reconnu qu'ils en fixaient une pour la toute première fois. Je le répète, il y a pleine identité de vue entre Libye et Tchad quant à la manière de poser ce problème, alors qu'il y a désaccord, désaccord total, quant à la solution à lui donner.

Bien entendu, il ne faut pas oublier, afin d'apprécier à sa juste valeur le traité franco-italien de 1935, qu'aucun des instruments

internationaux qui l'ont précédé n'a eu pour but explicitement affiché de délimiter la frontière dans la zone contestée. Nos aimables contradicteurs j'en suis certain ne nieront pas, je l'espère, ce qui relève de l'évidence même : dans toute l'histoire séculaire du différend, le traité de 1935 est bien le seul instrument par lequel les deux Etats titulaires de la souveraineté de part et d'autre du territoire à délimiter, à la suite d'une négociation spécifiquement axée sur la délimitation, ont établi un tracé bien déterminé, point géographique par point géographique, en exprimant avec précision la volonté (comme le dit l'article 2 du traité) de définir ainsi "la frontière séparant la Libye de l'Afrique occidentale française et de l'Afrique équatoriale française à l'est de TUMMO". Vous voyez qu'apparaît à l'écran le tracé qui a été négocié en 1935.

Monsieur le Président, Messieurs les juges, avant de procéder à l'analyse des accords de 1935, je voudrais faire deux remarques préliminaires.

La première est de caractère terminologique. Je suis en train de parler des "accords de Rome", au pluriel, et du "traité de Rome", au singulier (ou de "traité africain"). La raison en est que le traité en question est un, certes le plus important, mais un seulement des huit instruments qui furent signés le même jour par le chef du Gouvernement italien, Mussolini, et par le ministre français des affaires étrangères, Laval. Il ne faut pas oublier que les deux Etats avaient voulu clore à cette occasion, par un arrangement global, l'ensemble du contentieux colonial qui existait entre eux. Un autre de ces instruments, la déclaration générale, met cela en évidence, lorsqu'elle souligne que "les conventions [au pluriel donc] en date de ce jour ont assuré le règlement des principales questions que les accords antérieurs laissaient pendantes entre eux..." J'attire l'attention sur le terme "pendantes" : la

France et l'Italie déclarent donc solennellement qu'il y avait, entre les deux pays, des questions ouvertes, des questions non réglées précédemment, qu'on allait régler maintenant.

Deuxième remarque préliminaire : le traité de Rome est le seul, des huit instruments signés à cette date, dont l'entrée en vigueur était subordonnée à l'échange des instruments de ratifications, d'après son article 7. Dans son mémoire, le Tchad a démontré que les autres instruments, en revanche, sont entrés en vigueur immédiatement, dès leur signature, s'agissant d'accords en forme simplifiée. Qu'il plaise à la Cour de noter que la Libye reconnaît pleinement l'exactitude de cette analyse tchadienne : ce point peut donc être considéré comme acquis, au vu de l'accord qui existe entre les Parties à ce sujet précis.

2. Le texte du traité de 1935

Le moment est venu de regarder de près le texte du traité et de constater encore une fois ce qui saute littéralement aux yeux dès qu'on lit le premier alinéa de l'article 2 et qu'on le compare au premier alinéa de l'article 4. Pour rendre mieux intelligibles mes remarques, je demande que ces deux textes apparaissent maintenant à l'écran.

A l'article 2, concernant la frontière entre la Libye, d'une part, et l'Afrique orientale française et l'Afrique équatoriale française, d'autre part, on indique que cette frontière sera "déterminée" de la façon qui est précisée dans la suite de l'article : il est donc question de la "détermination", et non pas du déplacement ou de la modification d'une frontière préexistante. A l'article 4, par contre, l'expression utilisée est complètement différente; ici, concernant cette fois-ci la frontière entre l'Erythrée et la côte française des Somalis, on convient de la modification d'une frontière précédente, puisqu'on parle d'un tracé qui est substitué à un autre tracé.

Ces mots sont parlants. Il est clair qu'ils ont été choisis avec le plus grand soin afin de souligner la conviction de la France et de l'Italie que les opérations menées dans les deux cas étaient d'une nature bien distincte : délimitation concernant la Libye, rectification de frontière concernant l'Erythrée. Mais ce n'est pas tout : les textes que vous avez sous les yeux expliquent en toutes lettres les raisons juridiques justifiant le choix de ces mots. Dans le cas de l'Erythrée, il est précisé qu'il y a modification de frontière puisqu'auparavant une délimitation différente avait été établie par deux traités qui sont nommément cités, le protocole de Rome, etc. Dans le cas de la Libye, par contre, il faut parler de délimitation parce qu'aucun traité n'avait précédemment déterminé la frontière dans la zone, Toummo étant - l'article 2, comme vous le voyez, le dit explicitement - le "point terminal de la ligne fixée par l'accord de Paris du 12 septembre 1919".

Les dispositions du traité de 1935 sont d'une clarté tellement - comment dirais-je - "solaire", qu'on aurait envie presque de plaindre nos honorables contradicteurs, astreints comme ils le sont à défendre une thèse vraiment indéfendable. Leur habileté, cependant, est tout à fait remarquable : voilà que dans sa réplique le Tchad présente un argument textuel, un seul il est vrai, mais qui, à son sens, prouverait qu'avant 1935 il y avait bien une frontière dans la région litigieuse; et que cette frontière, le traité de 1935 la déplaçait en faveur de l'Italie. L'argument est tiré d'un passage du même article 2 où il est dit que la ligne-frontière est tracée de façon que telle ou telle localité "reste en territoire français" : le Tchad de dire si ces localités "restent" en territoire français d'après le traité de 1935, c'est qu'auparavant il y avait un autre tracé frontalier qui était plus favorable à la France.

L'argument est d'une grande subtilité; mais il est tellement subtil qu'il devient pratiquement évanescent, si on l'étudie de près : On peut y répondre sans difficulté en constatant que l'article 2 décrit et précise l'effet qui découlera de la délimitation qu'il prévoit : autrement dit, il spécifie qu'à certains endroits la ligne doit être tirée de façon que les lieux cités se retrouvent situés d'un côté ou de l'autre, mais ceci ne dit nullement où ils seraient si la délimitation n'était pas établie. En somme, le langage de l'article 2 est celui typique de tout traité de délimitation, indiquant que le tracé doit être placé sur la carte de manière qu'une fois la frontière établie, telles localités "resteront" englobées dans le territoire de l'un des Etats et d'autres localités chez le voisin.

D'ailleurs l'exactitude de cette analyse est confirmée par la lecture du communiqué de presse officiel du 8 janvier 1935, dans lequel les deux parties ont expliqué quel était l'objet et le but du traité. On

peut y lire la phrase suivante, au sujet de la ligne prévue à l'article 2 : "cette ligne laisse en territoire italien Aouzou et Ouezenti et en territoire français Bardaï et Tekro". Voilà qui met définitivement en pièces l'argument tchadien, puisqu'il est clair qu'ici aussi on décrit l'effet de la ligne nouvellement tracée, sans qu'on puisse rien arguer à partir de ces expressions quant à la question de savoir à qui appartenaient ces localités avant la délimitation. A moins que le Tchad, - comment dirais-je - pris à son propre piège, ne préfère admettre, pour rester cohérent avec son argument, que cette phrase du communiqué implique la reconnaissance par la France que Aouzou et Ouezenti appartenaient déjà à la Libye avant la conclusion du traité, vu que celui-ci les "laisse" du côté italien... !

Monsieur le Président, le texte du traité de 1935 exprime on ne peut plus clairement l'intention des Parties : celles-ci étaient parfaitement conscientes d'établir pour la première fois une délimitation dans la région. La ligne de l'article 2, dans la carte qui fut soumise au Parlement italien avec le texte du traité pour l'autorisation à la ratification, porte, en italien, la légende "nouvelle frontière méridionale", ("nuovo confine meridionale"), ce qui est sans aucun doute correct, s'agissant effectivement d'une frontière toute nouvelle. Mais, la Partie adverse n'est pas du tout d'accord et fait des efforts véritablement surhumains pour tirer de cette terminologie "nuovo confine meridionale" un argument qui semble véritablement tiré par les cheveux. D'après le Tchad, si en Italie on a parlé de "nuovo confine" (nouvelle frontière), c'est qu'on admettait par là implicitement qu'une vieille frontière était désormais remplacée par une nouvelle, et ceci tant dans le cas de l'Erythrée que dans celui de la Libye. Malheureusement ce syllogisme, impeccable en apparence, est tout à fait boiteux en réalité,

puisqu'il oublie que l'adjectif "nouveau" a une pluralité de sens, et ceci en italien comme en français, comme en anglais (et peut-être dans d'autres langues aussi). Qu'il me soit permis d'inviter nos éminents contradicteurs à donner un coup d'oeil, par exemple, au plus célèbre des grands dictionnaires de la langue française, le Littré : ils pourront y découvrir que "nouveau" peut certes signifier "autre, qui a changé", mais peut signifier aussi "qui est ou apparaît pour la première fois" (Littré, *Dictionnaire de la langue française*, Paris, Hachette, 1881, t. III, p. 757).

3. Le communiqué de presse

Monsieur le Président, Messieurs les Juges, je viens de citer le communiqué de presse du 8 janvier 1935 : c'est effectivement un document d'un très grand intérêt, puisqu'il clarifie bien la signification du traité de Rome. Il est utile de rappeler maintenant, en effet, que dans ce communiqué on décrit l'objet et le but du traité par une terminologie partiellement différente, mais dont le sens est parfaitement identique : il y est toujours question de la "détermination" de la frontière libyenne, alors que pour l'Erythrée le mot utilisé, cette fois-ci, est "rectification" : ceci confirme encore davantage, s'il y en avait besoin, le bien-fondé de l'interprétation du texte du traité que j'ai exposée il y a un instant. Mais ce qui est encore plus suggestif, puisqu'il s'agit cette fois-ci d'une nouvelle preuve, c'est que le communiqué qualifie de "territoires ainsi reconnus comme appartenant à la Libye" la bande de territoires qui, quarante ans plus tard, sera couramment appelée "la bande d'Aouzou". Voilà qui est dit d'une façon limpide et efficace : le traité de 1935 - contrairement à ce que le Tchad voudrait faire croire -

n'attribuait pas à l'Italie des territoires français, mais reconnaissait comme italiens des territoires situés dans une zone non délimitée et dont la France avait précédemment contesté l'appartenance à l'Italie.

Il me reste à préciser bien entendu quelle valeur probatoire peut être attribuée à ce communiqué. Pour répondre à cette question, il faut d'abord noter qu'il s'agit ici du communiqué officiel conjoint qui a été distribué à la presse à l'issue de la cérémonie officielle des signatures des accords de Rome, et qui a été publié par les journaux des deux pays. Cela va sans dire, il est notoire que de tels communiqués sont dûment négociés par les délégations des parties concernées. Notre communiqué constitue donc une déclaration publique et officielle de la France et de l'Italie, par laquelle les deux Etats expliquent conjointement et d'un commun accord quel est le but et le sens du traité de 1935.

Monsieur le Président, Messieurs les juges, votre jurisprudence est riche d'enseignements quant à la nature juridique de ce genre de documents. Dans votre arrêt du 19 novembre 1978 sur l'affaire du *Plateau continental de la mer Egée* (*C.I.J. Recueil 1978*, p. 39, par. 95-96) votre Cour a observé que "il n'existe pas de règle de droit international interdisant qu'un communiqué conjoint constitue un accord international..."; pour savoir si c'est le cas ou non, votre Cour dit tout "dépend essentiellement de la nature de l'acte ou de la transaction dont il est fait état", alors que la forme n'a pas beaucoup d'importance. Et la Cour de conclure en l'espèce que "pour déterminer quelle était en fait la nature de l'acte ou de la transaction consacrée par le communiqué..., la Cour doit tenir compte avant tout des termes employés et des circonstances dans lesquelles le communiqué a été élaboré". Dans deux autres arrêts bien connus votre Cour a mis en évidence que finalement "la seule question pertinente est de savoir si la rédaction

employée dans une déclaration donnée révèle ou non clairement l'intention..." du ou des auteurs. C'est dans l'arrêt du 26 mai 1961 dans l'affaire du *Temple de Préah Vihéar* (*C.I.J. Recueil 1961*, p. 32; et dans l'affaire des *Essais nucléaires*, arrêt, p. 267-268, par. 45).

Dans notre cas les choses sont on ne peut plus claires, vu les termes, les circonstances et le but du communiqué de presse de 1935. Sans l'ombre d'un doute, l'intention de la France et de l'Italie était d'expliquer officiellement le sens et la portée du traité de 1935. Le communiqué a donc une place de choix dans l'interprétation de ce traité, puisqu'il constitue un accord visant à élucider la signification juridique d'un autre accord conclu en même temps par les mêmes parties. On est, autrement dit, dans l'univers de l'interprétation authentique; on est plus précisément confronté à cette interprétation authentique de caractère contextuel dont il est question à l'article 31, paragraphe 2 a), de la convention de Vienne sur le droit des traités de 1969 : je rappelle que la convention de Vienne reconnaît une place de choix, pour l'interprétation d'un traité, au contexte, et que celui-ci comprend au premier rang "Tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité."

Permettez moi de dire, en concluant sur ce thème, qu'il est difficile d'imaginer un instrument international rentrant dans cette définition mieux que le communiqué de presse du 8 janvier 1935.

4. L'exposé des motifs

Monsieur le Président, j'ai laissé de côté jusqu'à présent la confirmation la plus explicite et la plus définitive de toutes, celle qui - pour ainsi dire - couronne la démonstration que je viens de présenter. J'ai procédé ainsi afin de faire ressortir d'emblée la bizarrerie de la remarque qu'on peut lire à la page 80 de la réplique tchadienne, d'après laquelle ce qui résulte de l'exposé des motifs, dont je vais parler maintenant, accompagnant le projet de loi français autorisant la ratification du traité de 1935 serait comme le dit le Tchad "la seule note discordante", par rapport à la thèse de la partie tchadienne.

Curieux propos, en effet, si l'on songe au faisceau cohérent de preuves et d'indices que j'ai rassemblés et illustrés jusqu'ici et qui s'ajoutent à ceux découlant des travaux préparatoires !

Après tout ce que les écritures libyennes ont souligné à ce sujet, je n'ai pas besoin de m'attarder longtemps sur cet exposé des motifs. Je rappelle qu'au moyen du document en question le Gouvernement français indiquait pourquoi il demandait à son parlement d'adopter la loi autorisant la ratification du traité de 1935. Autrement dit, le gouvernement voulait convaincre le Parlement français de dire oui, en lui montrant les avantages du traité et les difficultés que celui-ci aurait aplanies : une opération d'ailleurs parfaitement réussie, puisque le Sénat français dit oui à l'unanimité, alors que la Chambre des députés le fit à la majorité écrasante de 555 voix pour et 9 contre. Quel était l'argument du gouvernement, il est repris, presque mot à mot, d'un mémorandum du Quai d'Orsay de 1935 (mémoire de la Libye, "French Archives" annexe, vol. 3, p. 426). Voilà comment il est formulé dans le passage essentiel de l'exposé des motifs que je souhaite voir apparaître maintenant à l'écran et dont un extrait figure au n° 67 de votre dossier. Voici comment se lit le passage pertinent :

> "[l]'arrangement du 12 septembre 1919 laissait l'Italie et la France sans frontière conventionnelle à l'est de Tummo, le cabinet de Rome s'étant toujours refusé à reconnaître que la ligne de démarcation fixée par les accords franco-anglais de 1899 et de 1919 entre les zones d'influence de la France et de la Grande-Bretagne pût valoir à l'égard de l'Italie comme frontière politique entre territoires de souveraineté".

Un peu plus loin dans le même document on fait état de ce qu'à partir de 1928 (qui est la date de l'occupation du Fezzan par les forces armées italiennes au cours de la guerre contre la Senussya),

> "il apparut que l'absence de frontières gênerait les autorités locales des deux pays pour coordonner leur action de police et de contrôle des tribus".

Voilà des admissions tout à fait officielles, faites par le Gouvernement français devant son Parlement le 26 février 1935, des admissions qui détruisent complètement la thèse tchadienne, comme elles détruisent d'ailleurs toute la construction alambiquée que la France avait prétendu édifier sur les accords franco-italiens de 1900-1902. En effet, comme on peut le constater, en 1935 le Gouvernement français a publiquement et explicitement reconnu la parfaite exactitude de la thèse que la Libye a présenté à votre Cour : plus précisément, il a reconnu

primo : qu'avant 1935 il n'y avait pas à l'est de Toummo de "frontière conventionnelle", et même, carrément, qu'il y avait (deuxième passage) "absence de frontière" : ce qui implique entre autres que la France n'alléguait nullement qu'à défaut de conventions la frontière ait pu résulter d'autre chose, de l'effectivité ou de n'importe quels autres facteurs, - il y avait absence de frontière;

secundo : le Gouvernement français a aussi publiquement et officiellement admis en 1935 que l'Italie "s'était toujours refusée à reconnaître", en tant que "frontière politique", non seulement la ligne résultant de l'accord franco-anglais de 1919, mais aussi celle prévue par la déclaration franco-anglaise de 1899 : En somme, la France reconnaît pleinement (et le fait en 1935 !) que les accords franco-italiens de 1900-1902 ne sauraient être interprétés comme impliquant l'acceptation par l'Italie de la ligne de 1899 ou de 1919 en tant que frontière. C'est exactement le contraire de ce qu'allègue devant votre Cour le Tchad aujourd'hui, et il convient de demander à la partie tchadienne comment peut-elle soutenir avec tant d'assurance une thèse aussi clairement battue en brèche par tant de preuves décisives et concordantes.

J'en termine maintenant avec l'étude de cet exposé de motifs et je voudrais le faire par un bref rappel de la jurisprudence internationale portant sur la valeur probatoire de ce genre de documents internes d'origine gouvernementale fournis aux parlements nationaux. Il est vrai que le tribunal arbitral ayant décidé le 12 février 1985 d'un différend entre Guinée et Guinée-Bissau a considéré qu'à proprement parler ces documents ne faisaient pas partie des travaux préparatoires *stricto sensu*, mais les a tout de même pris en considération au titre très évidemment de travaux préparatoires au sens large (*RGDIP*, 1985, p. 515, par. 70). Votre Cour, cependant, sans se soucier de querelles de vocabulaire, n'a pas hésité à considérer que les explications données par un gouvernement dans l'exposé de motifs accompagnant un projet de loi nationale "lève les doutes qu'on pourrait encore avoir au sujet de son intention..." (*Plateau continental de la mer Egée, arrêt*, p. 27, par. 66) : au fond, ce qui est décisif est donc que l'intention soit clairement exprimée, comme l'a mis au clair votre jurisprudence que j'ai citée précédemment. Or, dans notre cas l'intention du Gouvernement français est parfaitement claire, au sujet des raisons qui, à son sens, rendent hautement souhaitable la ratification du traité de 1935 : c'est que ce traité établissait enfin une frontière là où - le Gouvernement français en donnait publiquement l'assurance - il y avait eu jusque-là "absence de frontière".

5. Le sort du traité de 1935

Monsieur le Président, j'en suis à la fin de la deuxième partie de ma plaidoirie. Il me reste encore à rappeler que la non-entrée en vigueur du traité de 1935 fut due à une décision du Gouvernement italien qui, malgré toutes les pressions qui lui venaient de la France, considéra que les sacrifices territoriaux envisagés par l'Italie, notamment concernant la Libye, ne se justifiaient pas vu que la France avait manqué à ses engagements relatifs au dossier éthiopien, en particulier du fait que celle-ci n'avait pas pris la défense de l'Italie devant la Société des Nations face à l'indignation générale causée par l'agression italienne à l'Ethiopie. Je noterai qu'il n'y a pas de désaccord entre les Parties quant à l'identification des raisons ayant empêché l'échange des ratifications, de sorte qu'il n'est pas utile de s'y attarder. Bien entendu, la non-entrée en vigueur du traité de Rome ne lui enlève rien de sa signification éminente, pour ce qui est de la preuve qu'en 1935 la France reconnut officiellement qu'aucun traité précédent n'avait valablement délimité la frontière à l'est de Toummo.

Quant à la question de savoir dans quelle mesure le traité de 1935 mérite d'être pris en considération par votre Cour une fois que, s'étant assurée de l'absence de frontière dans la région litigieuse, elle en viendra à établir la délimitation, j'aurai l'honneur de présenter le point de vue de la Libye mardi de la semaine prochaine.

TROISIEME PARTIE

LES EVENEMENTS ENTRE 1935 ET LA FIN DE LA GUERRE MONDIALE

1. Evaluation générale

J'en viens maintenant, Monsieur le Président, à la troisième partie de ma plaidoirie d'aujourd'hui, qui porte sur la période qui va des accords de Rome de 1935 à la fin de la seconde guerre mondiale. Schématiquement, on pourrait décomposer cette période en deux sections.

La première, qui va jusqu'à la fin de 1938, est caractérisée par un climat d'attente : des deux côtés, on se prépare à l'entrée en vigueur de la délimitation de 1935, on prend des dispositions en vue de cela et on s'inquiète de l'incertitude qui a été créée par le fait que les procédures d'échange des ratifications traînent en longueur.

La deuxième section va de 1939 au traité de paix de 1947, et ici on voit la France et l'Italie se retrancher sur les positions d'avant 1935. La France, n'ayant pu convaincre l'Italie d'échanger les ratifications, va faire semblant d'oublier tout ce qu'elle avait admis ouvertement en 1935 et, avec un aplomb tout-à-fait remarquable, va reprendre sa prétention traditionnelle, suivant laquelle la ligne d'est-sud-est du *Livre jaune* de 1899, telle qu'interprétée par la convention franco-anglaise de 1919, constituerait la frontière méridionale de la Libye. De son côté, l'Italie maintiendra l'idée que la frontière est toujours à déterminer en prenant en considération tant les titres ottomans que les droits italiens basés sur l'accord de Londres de 1915.

Il convient de rappeler tout de suite qu'aucune nouvelle négociation n'aura lieu entre les deux Etats bientôt emportés dans la tourmente de la seconde guerre mondiale. La situation existante quant à la question de la frontière méridionale ne sera donc plus modifiée, du moins jusqu'à la sortie de scène de l'Italie. Cependant, deux épisodes de cette période méritent d'être mis en évidence, puisqu'ils confirment clairement l'absence de délimitation.

2. L'incident de *Jef-Jef*

Le premier est celui que le Tchad appelle l'incident de Jef-Jef de 1938 : un incident mineur, que la Partie adverse s'est évertuée à monter en épingle en le déformant passablement, afin d'en tirer une signification qu'il n'a certainement pas. Pour le Tchad, en effet, cet épisode prouverait que l'Italie reconnaissait la souveraineté de la

France sur la bande de Aouzou, alors qu'en réalité tout ce qu'on peut en déduire est que les deux Etats maintenaient leurs positions respectives. De plus, l'incident se déroula à un moment où le sort du traité de 1935 était encore incertain, et non pas - comme le Tchad le prétend - à un moment où il était devenu clair que ce traité n'entrerait jamais en vigueur.

Toute l'histoire de Jef-Jef naît des travaux de forage d'un puits que l'Italie avait décidé d'effectuer en avril 1938 dans une localité se situant dans la partie de la zone contestée que le traité de 1935 reconnaissait comme italienne. Vous voyez à l'écran où Jef-Jef se situe exactement. Voilà Jef-Jef qui va être placé par rapport aux principales lignes dont on discute. Des travaux de forage, donc, qui avaient été entrepris du côté italien au moyen d'ouvriers; ces travaux furent interrompus par les forces françaises, puis ils furent repris tambour battant par des militaires italiens et menés jusqu'à leur terme, sans que cette fois-ci les forces françaises, comme il y avait désormais des militaires italiens, n'osent intervenir pour les arrêter. Toutefois, des notes diplomatiques furent échangées, afin de préciser les points de vue respectifs (mémoire du Tchad, p. 214 et suiv.; contre-mémoire de la Libye, p. 374 et suiv.). Indépendamment du langage utilisé de part et d'autre, il est clair que l'Italie réalisa son but, qui était de faire acte de souveraineté dans la zone en effectuant des travaux de génie civil et en laissant des marques indiquant que le lieu concerné était en territoire italien (comme on peut le voir dans le dossier sur l'incident de Jef-Jef, contre-mémoire du Tchad, livre IV, p. 541). Mais il est vrai aussi que du côté français cette conduite de l'Italie fut contestée, quoique avec une extrême modération, au nom d'une continuité de la souveraineté française dans la zone jusqu'à une éventuelle entrée en vigueur du traité de 1935. Cependant, s'il est certain que la France,

tout en gardant un profil très bas, ne s'inclina pas au point de vue italien, il est certain aussi qu'aucun document ne témoigne d'un acquiescement italien à l'attitude de la France : au contraire, le contre-mémoire libyen a démontré (p. 374 et suiv.) que l'Italie garda ses convictions et sa position au sujet de l'appartenance du territoire en question.

Le Tchad, en particulier, déforme vraiment la réalité lorsqu'il prétend que l'aide-mémoire italien du 3 mai 1938 aurait impliqué la reconnaissance par l'Italie de la ligne de 1919 en tant que frontière méridionale de la Libye : si tel avait été le cas, l'Italie aurait dû présenter ses excuses, ayant violé la souveraineté territoriale de la France. Or, l'Italie ne s'excusait pas du tout : bien au contraire, c'était elle qui s'élevait contre la décision des militaires français d'empêcher la continuation des travaux; c'était elle qui, sans la moindre hésitation, notifiait à la France que les travaux allaient être repris, et ceci en se gardant bien de demander une quelconque autorisation ! Ces travaux, d'ailleurs, furent effectivement continués et achevés sans entraves. Face à une telle attitude de l'Italie, on aurait pu s'attendre à de fortes et immédiates réactions de la France, alors que le Quai d'Orsay mit un mois et demi pour répondre, le 20 juin, par une note très conciliante dans laquelle, après avoir rappelé la position de principe de la France, on s'empressait de déclarer que l'incident était clos, vu que les travaux étaient terminés (mémoire du Tchad, p. 215). Voir dans tout cela un acquiescement de l'Italie aux positions de la France relève d'une fantaisie - me semble-t-il - singulièrement débridée.

Il est vrai, Monsieur le Président, que dans l'aide-mémoire italien du 3 mai la localité en question était décrite comme située "dans la zone comprise entre la frontière actuelle de la Libye et la frontière résultant des accords Mussolini-Laval de 1935". C'est une indéniable

maladresse verbale, mais qui est loin de justifier toute la construction que le Tchad voudrait y fonder. En effet, l'expression "frontière actuelle" était tirée du rapport du gouverneur général de la Libye, Balbo, qui était notoirement le plus ardent défenseur des droits territoriaux de l'Italie sur l'*hinterland* libyen. Les termes en questions se référaient donc sans aucun doute à la situation qui existait en fait, quant à la disposition sur le terrain des forces armées italiennes et françaises, et non pas à la situation juridique. Il va de soi, en effet, que tant le gouverneur Balbo que le Gouvernement italien savaient parfaitement qu'à peine quelques années plus tôt, comme le professeur Cahier vous l'a rappelé, l'Italie avait protesté fermement contre par exemple l'établissement d'un préside militaire français à Tekro, qui est au sud de Jef-Jef, comme l'Italie savait parfaitement bien sûr, qu'elle avait régulièrement protesté, entre 1921 et 1934, contre la convention franco-anglaise de 1919. C'est au vu de ce contexte diplomatique et politique que le document de 1938 doit être très évidemment interprété.

3. Les discussions de 1941 sur la zone démilitarisée dans le cadre de la commission d'armistice

Monsieur le Président, il m'incombe encore de dire deux mots sur un deuxième épisode : celui de l'échange de lettres entre le général Grossi, président de la commission d'armistice franco-italienne de 1941, et les autorités françaises, au sujet de la zone démilitarisée de 200 km qui devait être établie le long des frontières libyennes, après la convention d'armistice entre les deux pays de 1940. J'en dirai deux mots seulement, d'une part parce que les Parties ont traité le sujet en profondeur par écrit, d'autre part et surtout parce qu'il serait inutile de s'appesantir sur un thème duquel, avec la meilleure bonne volonté, aucun argument d'utilité ne peut être tiré quant au règlement du présent différend.

Certes, le Tchad n'est pas d'accord, puisqu'au contraire il tente l'impossible afin d'extraire des documents pertinents des indices imaginaires d'acquiescement de la part de l'Italie. Mais en réalité, il suffit de lire sans parti pris les documents en question pour constater qu'au bout du compte les deux Etats avaient simplement repris leurs positions traditionnelles, au vu du fait que le traité de Rome de 1935 n'était finalement pas entré en vigueur.

Toute l'histoire peut être résumée ainsi. Le général Grossi, constatant que la frontière n'avait jamais été déterminée, proposa le 12 mars 1941 à la France de calculer cete zone démilitarisée de 200 km à partir de la ligne de 1935. Aux yeux des Italiens, cette ligne pouvait être provisoirement utilisée, en attendant une future délimitation, vu qu'elle était la seule qui résultât d'un document négocié par l'Italie et la France en même temps (et ceci même si le traité de 1935 n'était pas en vigueur). Les autorités françaises hésitèrent longtemps à réagir; après un débat interne assez confus et rendu d'ailleurs très difficile par la

situation de l'époque (puisqu'il s'agissait du gouvernement de Vichy), la réponse tomba finalement deux mois plus tard, le 14 mai 1941. Cette réponse comportait la contre-proposition d'utiliser plutôt la ligne de 1899-1919, puisque pour la France celle-ci avait été acceptée par l'Italie en 1900-1902, alors que le traité de 1935 avait été, dit la lettre française, "récusé" par l'Italie.

Comme on le voit, rien de particulièrement nouveau jusqu'ici : la France, en oubliant les admissions explicites qu'elle avait faites en 1935, avait repris sa thèse traditionnelle que nous connaissons bien. Mais là où les choses prennent une toute autre tournure, du moins dans l'esprit du Tchad, c'est lors de la réponse italienne à la contre-proposition française. D'après le contre-mémoire du Tchad, cette réponse fut, ni plus ni moins, une véritable capitulation, l'Italie n'ayant pas su contester la valeur et le bien fondé de la thèse française.

Messieurs les juges, quelle inventivité ! Très franchement, il est difficile de comprendre comment la Partie adverse peut lire tant de choses, une capitulation dans une courte lettre du 14 juillet, dans laquelle le général Grossi signale : 1) que la question de la frontière dépasse les compétences de la commission d'armistice et trouvera place parmi les problèmes à régler après la guerre; 2) pour l'application de l'armistice ladite question n'a plus d'importance pratique et elle peut par conséquent rester sans solution. Est-ce cela une capitulation ? Mais c'est le contraire peut-être ! A deux reprises, en effet, dans cette courte lettre le général Grossi d'Italie souligne que la frontière méridionale de la Libye n'est pas délimitée, malgré ce que prétend la France : pourquoi sinon le général Grossi rangerait-il la question de la frontière parmi les problèmes à régler après la guerre ?

Pourquoi sinon affirmerait-il que pour l'heure cette question peut rester "sans solution" ? En somme, il est clair que, par la lettre du général Grossi, les autorités italiennes contestaient nettement la position de la France d'après laquelle la frontière méridionale de la Libye était déjà délimitée, ceci du fait même d'indiquer explicitement que pour l'Italie cette frontière restait à établir dans le futur.

Monsieur le Président, Messieurs les juges, une conclusion s'impose : après l'époque des accords de Rome la France, en oubliant la reconnaissance explicite de 1935 qu'aucune frontière n'avait jamais été délimitée dans la région contestée, a repris sa vieille thèse d'après laquelle cette frontière existait déjà, puisque l'Italie avait soi-disant accepté en 1900-1902 la ligne de 1899-1919. L'Italie, de son côté, ne s'inclina jamais devant la thèse française et maintint fermement sa position : la délimitation était toujours à établir, et elle devait l'être en respectant ses droits territoriaux, tels qu'ils lui venaient de l'héritage ottoman et de l'accord de Londres de 1915.

QUATRIEME PARTIE

Le traité de paix de 1947 et la frontière méridionale de la Libye

1. Evaluation générale

Monsieur le Président, Messieurs les juges, il est temps d'en venir à la quatrième et dernière partie de ma plaidoirie d'aujourd'hui. Je voudrais parler maintenant du document international qui consacre la sortie de scène de l'Italie : le traité de paix de 1947. A l'issue de la deuxième guerre mondiale, en effet, ce traité démantèlera l'empire colonial italien : l'Italie quitte donc la Libye, ayant été obligée à renoncer à toutes ses possessions africaines, y compris tous les droits et titres y relatifs comme le dit l'article 23, paragraphe 1 du traité de

paix. Conformément à l'article 23, paragraphe 2, la Libye demeura sous l'administration française et britannique jusqu'à ce que son "sort définitif" comme le dit le traité (c'est-à-dire l'accès à l'indépendance) ne fût arrêté. Et on sait que les décisions y relatives furent adoptées finalement par l'Assemblée générale des Nations Unies, à défaut de la décision que les quatre puissances ne surent pas arrêter dans le délai d'un an que le traité leur concédait. Sir Ian Sinclair parlera de tout cela demain matin.

Dans la présente partie finale de ma plaidoirie, j'entends traiter rapidement de l'effet du traité de paix sur le dossier des frontières libyennes. Un thème, celui-ci, qui a été longuement discuté dans les écritures des Parties, de sorte qu'il suffira d'en rappeler les éléments essentiels.

Première observation à faire est que le traité de paix ne consacra pas l'intangibilité des frontières de la Libye et des autres ex-colonies italiennes : au contraire, il fut prévu que les frontières en question pouvaient être "ajustées", c'est le terme qu'on utilisa, "ajustées" d'un commun accord par les quatre puissances dans le délai d'un an. Cette réglementation s'explique aisément si l'on songe, en particulier, que la France d'un côté et l'Egypte de l'autre côté envisageaient de faire valoir des aspirations territoriales aux frais de la Libye : ce qui poussa donc à établir dans le traité de paix la possibilité de modifier, d'ajuster le cas échéant les frontières du territoire en question.

Deuxième observation : le traité de paix ne transféra pas aux puissances la souveraineté sur la Libye, comme la réplique tchadienne le prétend à tort, et le traité de paix octroya aux puissances seulement le droit de continuer à "administrer" la Libye ainsi que celui de prendre certaines décisions importantes dans un délai restreint.

Indiscutablement, la souveraineté de l'Italie s'était éteinte en vertu de l'article 23. Toutefois ceci comporta, non pas un transfert de souveraineté, mais une période d'attente et de suspension que seule la décision sur le sort final de la Libye allait clore. De toute façon, il ne vaut pas la peine d'approfondir cette question, puisque - comme on le verra sous peu - elle n'a pas d'incidence particulière, quoique la Partie tchadienne en dise.

2. Les traités franco-italiens concernant la Libye non notifiés conformément à l'article 44 du traité de paix

Monsieur le Président, l'un des thèmes débattus dans les écritures des Parties au sujet du traité de paix est celui de savoir quelles sont les conséquences du fait qu'aucun des traités franco-italiens concernant la Libye n'a été notifié par la France à l'Italie conformément à l'article 44 du traité de paix. Cet article prévoyait, en effet, que les traités bilatéraux non notifiés par la puissance intéressée, non notifiés à l'Italie, "seront tenus pour abrogés". Au vu de ce régime juridique précis, la Libye a soutenu qu'après la guerre, et donc en 1955, les traités franco-italiens sur lesquels le Tchad appuie ses revendications ne pouvaient pas être considérés comme en vigueur.

Mais le Tchad n'est pas de cet avis . Pour lui les traités en question n'avaient pas à être notifiés parce qu'après la guerre l'Italie n'était plus concernée, ayant perdu tout droit et titre par rapport à la Libye. Ce raisonnement, pourtant, est fort hâtif, puisqu'il omet avant tout de prendre en considération le libellé très net de l'article 44, qui, en cas de non notification, frappe d'abrogation "tous les traités de cette nature", comme dit le traité de paix, à savoir tous les traités bilatéraux conclus par une puissance "avec l'Italie antérieurement à la guerre". Autrement dit, chacune des puissances alliées et associées

devait savoir que, si elle désirait "le maintien ou la remise en vigueur" d'un quelconque traité bilatéral conclu avec l'Italie avant la guerre, elle devait nécessairement le notifier. Il est clair que le régime de l'article 44 était construit comme devant s'appliquer à la totalité des traités rentrant dans la définition prévue, sans aucune exception. Il faut donc présumer que la France n'a pas notifié les deux traités franco-italiens de 1900-1902 et de 1919 parce qu'elle ne souhaitait pas leur maintien en vigueur.

Cette présomption s'avère d'ailleurs parfaitement fondée si l'on songe que, par une autre disposition figurant dans le même traité, à l'annexe XI, les quatre puissances, je l'ai dit, se réservaient le droit d'"ajuster", donc de modifier les frontières libyennes : la France, en effet, avait des aspirations en ce sens, comme je l'ai rappelé il y a quelques instants. Dans ces conditions, il était parfaitement logique pour la France de ne pas notifier les traités avec l'Italie qu'elle considérait relatifs aux frontières libyennes : ceci non pas parce que ces traités ne concernaient plus l'Italie, mais parce que pour la France il convenait mieux, justement, de s'en débarrasser afin de préparer le terrain pour les "ajustements" qu'elle cherchait à obtenir. Qu'il me soit permis de noter que dans son mémoire, à la page 123, le Tchad avait ouvertement admis que c'est bien comme ceci que le comportement de la France doit être expliqué. Ensuite, dans sa réplique, se rendant compte que la vérité lui est nuisible, la Partie tchadienne a essayé - un peu tardivement à vrai dire - de changer son fusil d'épaule.

Il est certain que la France souhaitait ardemment modifier à son avantage les frontières libyennes, tant à l'ouest qu'au sud (mémoire du Tchad, annexe 212); la France s'était donné - par l'annexe XI du traité de paix - le moyen de procéder en toute légalité à ces modifications, si elle arrivait à glaner le consentement des autres puissances ou, plus tard, celui de l'Assemblée générale ; il va de soi que la France devait alors, par cohérence, mettre hors jeu tout le trousseau de dispositions bilatérales qui fixaient ces frontières (ou dont elle s'était presque toujours déclarée convaincue qu'elles les fixaient, avec cependant l'exception remarquable de 1935). C'est exactement à cela que rimait la décision de ne pas notifier ces dispositions, en provoquant par là leur abrogation (quitte à essayer de les ressusciter par la suite en cas de nécessité).

Il est à noter que ces motivations amenèrent la France à ne notifier ni l'accord franco-italien de 1919 (qui traçait effectivement une frontière dont la modification était vivement souhaitée du côté français), ni les accords de 1900-1902. Or, en réalité - nous le savons bien - ces derniers instruments n'avaient délimité aucune frontière, notamment dans la région qui nous intéresse. Mais au départ la France avait soutenu le contraire, en continuant sur la lancée pendant des décennies, puis elle avait changé de cap en 1935, puis elle était revenue à la case-départ après : il aurait donc été totalement illogique de notifier les accords en question, étant donné que les aspirations territoriales françaises portaient également, dans l'après-guerre, sur les territoires situés au nord de la ligne de 1899 et de celle de 1919.

Monsieur le Président, Messieurs les Juges, j'en viens au dernier point.

3. L'effet du traité de paix sur l'article 13 de l'accord de Londres de 1915

Les considérations précédentes n'ont pas touché la question de la survie de l'obligation prévue à l'article 13 du traité de Londres de 1915, puisque le régime de l'article 44 se référait aux seuls traités bilatéraux, et non pas aux traités multilatéraux. Le sort de l'article 13 suite à la succession entre l'Italie et la Libye est donc régi par les principes de droit international général pertinents, à défaut d'un *jus speciale* de caractère conventionnel qui serait fixé dans le traité de paix. Il faut alors se référer, comme la Libye l'a démontré, au principe consacré à l'article 11 de la convention de Vienne sur la succession d'Etats en matière de traités et retenir que, dans la mesure où l'article 13 du traité de 1915 prescrit une obligation pesant sur la

France à l'avantage de l'Italie qui influence le règlement d'une question relative à la délimitation de la frontière de la Libye, le fait que l'Italie ait perdu la souveraineté sur la Libye ne saurait faire disparaître l'obligation en question, qui reste en vigueur à l'avantage de la Libye.

Le Tchad n'est pas d'accord avec cette analyse, que la Libye a développée longuement dans son contre-mémoire : la thèse du Tchad à ce sujet est que, au contraire, l'obligation de la France envers l'Italie découlant de l'article 13 prit fin avec le traité de paix, du fait même que l'Italie avait renoncé à ses droits et titres coloniaux. Mais cette thèse ne répond pas à la vraie question. Il est indiscutable, en effet, que l'Italie perdit en 1947 le droit de bénéficier de l'article 13, cela va de soi : et la Libye se garde bien de le contester. Mais ceci n'exclut nullement que la Libye, une fois venue en existence, ait hérité du titre juridique découlant de l'article 13, comme elle a sans aucun doute hérité de tous les autres titres italiens et ottomans susceptibles d'influencer le règlement de la question relative à la délimitation de la frontière.

Il est clair, Monsieur le Président, Messieurs les Juges, que le Tchad ne peut pas souffler le chaud et le froid en même temps. Autrement dit, soit le Tchad soutient que la Libye n'est à aucun effet le successeur de l'Italie concernant le territoire libyen, et dans ce cas il doit accepter la conséquence suivant laquelle la Libye, ni ne peut bénéficier des droits territoriaux de l'Italie, ni n'est liée par les obligations de même nature qui pesaient sur celle-ci; soit le Tchad reconnaît que la Libye a succédé à l'Italie concernant le territoire libyen, et dans ce cas il ne peut échapper à la conséquence suivant laquelle l'héritage colonial reçu par la Libye comporte non seulement des contraintes et des obligations, mais aussi des avantages et des droits.

4. Conclusion

En conclusion, Monsieur le Président, Messieurs les Juges, on peut constater qu'à la fin de la période italienne, tout comme au début, le territoire de la Libye n'était pas délimité vers le sud, comme la France l'a d'ailleurs explicitement reconnu en 1935. Après 1947, donc, cette délimitation était toujours à établir en prenant en compte les arguments et titres juridiques pertinents, tels que l'Italie les avait reçus de l'Empire ottoman et qu'elle les a transmis à la Libye. Non seulement l'Italie n'avait renoncé à aucun de ces titres, mais en plus elle en a accumulé (et donc transmis à la Libye) un nouveau, découlant de l'article 13 de l'accord de Londres de 1915.

Je vous remercie, Monsieur le Président.

The PRESIDENT: Thank you very much, Professor Condorelli. So tomorrow at ten o'clock we resume with, I think, Sir Ian Sinclair. Thank you very much.

La séance est levée à 13 heures

CR 93/18

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Friday 18 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le vendredi 18 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sene-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Olivier Corten, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susan Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Sir Ian.

Sir Ian SINCLAIR: Mr. President, Members of the Court, Professor Condorelli yesterday took us through the 1935 settlement and its aftermath. He also analysed the relevant provisions of the Italian Peace Treaty of 1947. My task this morning is to carry the story forward through the deliberations of the Four-Power Commission in 1948/1949 and the various United Nations debates resulting in the adoption of General Assembly resolution 392 (V). I will also take this opportunity to summarize the boundary situation as it appeared to be on the critical date. Finally, I would wish to make some remarks about the allegations that pre-1951 conduct can constitute acquiescence in a boundary which would become binding on Libya upon her achievement of independence.

Now, Mr. President, my task has been simplified by the fact that, in my first statement to the Court on Tuesday last about the interpretation of Article 3 of the 1955 Treaty, I did review the proceedings of the Four-Power Commission in 1948/1949 and the debates in the United Nations on the Libyan question in 1950/1951. I will not therefore revert to these matters in any great detail.

The Court will, of course, be aware that France remained in military occupation of the Libya/Chad borderlands and indeed of the Fezzan from 1943 to the end of 1956 when the French military had to evacuate the Fezzan. For this reason, there was little or no pressure upon France to seek to define or delimit those of its boundaries with Libyan territory which had not yet been defined or delimited. At the time of Libya's independence in 1951, France had no intention of leaving the Fezzan, far less the Libya/Chad borderlands. Thus, from France's point of view, the question of whether there existed a southern boundary dividing Libya from French Equatorial Africa and, if so, where it ran, was of minor importance; and from Libya's point of view, the issue was not an immediate one, given the continued presence of French forces in the Fezzan even after Libya had achieved independence.

Now, as we know, the failure of the Four Powers to reach agreement on the final disposal of Libya pursuant to Article 23 of the Italian Peace Treaty meant that the Libyan question had to be referred to the United Nations General Assembly at the end of 1948. At this time, views were deeply divided about the future of Libya. The British were hostile to any proposal that Italy might be

granted a trusteeship over territory occupied by Senoussi tribes because of a specific promise which the then British Foreign Secretary had made to the Senoussi on 8 January 1942. Both the British and the French Governments had serious reservations about according early independence to Libya in view of doubts which were then held about its economic self-sufficiency. On the other hand, opinion within Libya itself clearly favoured completed independence for a united Libya.

The Libyan question was eventually referred to another Sub-Committee of the First Committee, designated as Sub-Committee 17. And the report of Sub-Committee 17 was issued on 1 November 1949. It recommended that Libya be constituted an independent and sovereign State, and that this independence should become effective as soon as possible and in any event not later than 1 January 1952. And this was the basis for General Assembly resolution 289 (IV) of 21 November 1949. It may be noted that France abstained from the vote on the resolution as a whole, but declared its acceptance of the verdict of the United Nations and pledged that it would give its implementation all the assistance required. And Section C of General Assembly resolution 289 (IV) addressed the issue of Libya's boundaries and called upon the Interim Committee of the General Assembly to study the procedure to be adopted to delimit the boundaries of the former Italian Colonies in so far as they were not already fixed by international agreement and report with conclusions to the fifth regular session of the General Assembly.

It is common ground between the parties that the first step taken by the Interim Committee was to commission a study from the Secretariat, the members of the Committee professing ignorance of the various boundary questions involved. And the Secretariat study of 27 January 1950 (ML, Exhibit 62) is, as the Court will be aware, a key document in the present case. In the introduction to the study, it was rightly indicated that the determination of whether individual boundaries "are already fixed by international agreement" was for the Interim Committee itself to make. The study then proceeded to consider "existing international agreements regarding the boundaries of the former Italian colonies." Illustrative sketch maps were annexed to the study, one of which concerned Libya's boundaries. I need not, Mr. President, reproduce this sketch-map. The Court will already be familiar with it and it is, of course, Map No. 6 in the Judges' folder.

It is of course in relation to Libya's southern boundary that the Secretariat study displays most uncertainty; and we know why. The Treaty of Rome of 1935, concluded between Italy and France, had established, for the first time, a conventional boundary between Toummo and the Sudanese border. That boundary had been reproduced on a number of maps — British, Italian and French — in the period between 1935 and 1938. Until the end of 1938, there was a general expectation that the 1935 Treaty would be ratified by both parties; but of course that general expectation was not fulfilled for the reasons given by Professor Condorelli yesterday.

The Secretariat study also summarized the five boundary questions which had arisen, two of which concerned Libya. These were the question of the boundary between Libya and Egypt and the question of Libya's southern boundary.

On Libya's southern boundary, the study commented:

> "It is not clear whether and to what extent this frontier has been delimited or demarcated. Further information will be required to enable the Interim Committee to determine whether the frontier is fixed in the sense of the General Assembly resolution [i.e., GA Resolution 289 (IV)] and if not, to study the procedure for its delimitation."

And this continuing uncertainty was not dissipated by subsequent developments. I have already reviewed, in my statement to the Court on Tuesday last, subsequent developments leading to the adoption of resolution 392 (V).

I would simply recall that, at the meeting of the *Ad Hoc* Political Committee held on 13 December 1950, the French representative (M. Naudy) made it abundantly clear to all delegations that the French claim for modification of the Libya/Algeria boundary in the region of Ghat and Serdeles was a claim for boundary *rectification* which fell outside the scope of the draft resolution. The Court will of course note that, at this stage, the French delegation did not raise any issue about the course of the boundary line between Ghadames and Ghat. That was to come later — in the closing months of 1955 after signature of the 1955 Treaty — and, as we know, was to lead to the Exchange of Letters between France and Libya of 26 December 1956.

It was at this same meeting of the *Ad Hoc* Political Committee on 13 December 1950, that M. Naudy acted to correct the erroneous information which France had conveyed to the Four-Power Commission about the legal basis for what France asserted to be Libya's southern boundary.

M. Naudy postulated the existence of a boundary east of Toummo on the Franco/Italian Agreement of 1 November 1902, and he said:

> "According to the Agreement of 1902, the boundary in question was the boundary of Tripolitania indicated in the map annexed to the Additional Declaration of 21 March 1899, to the Franco/British Convention of 14 June 1898. That Additional Declaration had been completed by a Supplementary Franco/British Convention signed on 8 September 1919, and by a Franco/British Declaration of 21 January 1924 relating to a protocol of 10 January of the same year. The matter was therefore governed at present by all the texts he had just quoted."

Seldom can a statement purportedly designed to correct errors and to clarify the situation have succeeded in creating such additional confusion. For, of course, as the Court is aware, "the boundary of Tripolitania" was no more than a notional limit; there was no map annexed to the Additional Declaration of 21 March 1899; and the so-called "boundary of Tripolitania" had nothing to do with the south-east line described in Article 3 of the Additional Declaration of 1899. All this has been fully demonstrated by Mr. Sohier earlier this week.

Chad would have the Court believe that M. Naudy's corrective statement to the *Ad Hoc* Political Committee cured all the defects in the French explanation. But how can this be so? How can the notional "boundary of Tripolitania" be equated with the south-east line described in Article 3 of the Additional Declaration of 1899? How can it be plausibly contended that an international boundary opposable to Libya resulted from the medley of treaty instruments referred to by M. Naudy? How can an agreement entered into in 1902 between France and Italy commit Italy's successor in title some 50 years on to a boundary line said to derive *inter alia* from a Franco/British Convention of 1919? The questions are endless, the gaps in the argument unbridgeable. One can perhaps admire the ingenuity and, one might say, panache with which the attempt is made to construct a logically satisfying case for the proposition that Article 3 of the 1955 Treaty confirms a boundary between Libya and Chad east of Toummo in the sense of the 1919 line. But the effort is doomed to failure. The house of cards begins to topple at the first puff of wind. More, I would submit, is required to sustain Chad's first theory than simple reiteration of arguments so fatally flawed.

So now we have resolution 392 (V). How does Chad — how can Chad — respond to the

question of what is meant by the reference in that resolution to the portion of Libya's boundary with French territory not already delimited by international agreement? Well, Chad says that the text of resolution 392 (V) does not in terms stipulate that Libya's southern boundary has not been delimited. According to Chad, the resolution refrains from stating the extent to which the boundary between Libya and French possessions in Africa is or is not delimited (RC, para. 5.19). Even admitting this to be true in principle, how can Chad explain away the fact that the General Assembly did determine in terms that there *was* a portion of Libya's boundary with French possessions (admittedly an unspecified portion) which had not already been delimited by international agreement? And how can Chad deny that that unspecified portion of Libya's boundary must be the boundary east of Toummo?

Resolution 392 (V) is another key instrument in the history of the present dispute. It certainly created the expectation that, upon Libya's achievement of independence, there would follow substantive negotiations between France and Libya to settle and indeed to delimit those portions of Libya's boundary with French possessions which had not yet been delimited by international agreement, in particular Libya's boundary with what is now Chad.

It is of course, Mr. President, an astonishing feature of the story that France voted in the General Assembly in *favour* of resolution 392 (V). Despite Chad's arguments in her written pleadings, despite the protestations of France in the immediate aftermath of signature of the 1955 Treaty that all boundary problems between France and Libya had been resolved, France had accepted in 1950 that there was a portion of Libya's boundary with French possessions which had not yet been delimited.

I turn now to the second part of my statement this morning. This is devoted to a summary of the boundary situation on the critical date — i.e., 24 December 1951. Here I am confronted with a major problem. How can I illustrate what Libya believes to be the boundary status quo on that date — namely the *absence* of a conventional boundary in the sector of Libya's boundary between Toummo and the Sudanese frontier? Professor Condorelli, in his address to you yesterday, took the opportunity of displaying and explaining to you a whole series of Italian maps published by the Italian Ministry of Foreign Affairs and dating from 1906 onwards. It is no part of my intention to

repeat Professor Condorelli's demonstration. In particular, I will refrain from showing again the Italian maps of 1906, 1912, 1926, 1937 and 1939. But the Italian map of 1941, published by the Italian Ministry of Foreign Affairs in that year, is now being shown on the screen. This is the nearest Italian map, in point of time, to the critical date of 24 December 1951. As can be seen, the 1941 map shows no boundary east of Toummo. As Professor Condorelli has so convincingly demonstrated, no official map published between 1906 and 1951, with the one exception of the 1937 map (which showed the 1935 line), showed any boundary line east of Toummo.

Professor Condorelli has also analysed the so-called "Italian school map" incident. There is only one additional point I would wish to make about this incident. The Court may recall that the memorandum from the French Embassy in Rome of 12 December 1930, which politely complained about the depiction of the whole of Tibesti in the colour green, contained the following sentence:

> "If a very precise line of demarcation separates French and Italian territories only as far as Toummo, the identity of colour (green) between Libya and the territory to the east and south-east of Toummo designated as Tibesti tends to convey the impression that this area is included within the Italian zone." (ML, Italian Archives Ann., p. 93).

The additional point I would wish to make is that this extract from the French Embassy's memorandum of 12 December 1930 proceeds of course on the hypothesis that a very precise line of demarcation divides French and Italian territory only as far as Toummo. This is of course quite contrary to the French thesis that, in 1930, a precise delimitation had been effected as far as the Sudanese border.

Now Libya relies on the terms of General Assembly resolution 392 (V) as being indicative of what was the boundary status quo on the critical date. That resolution, adopted just over a year prior to the critical date, had again proceeded on the basis that there was a portion of Libya's boundary with French territory which had not already been delimited by international agreement. The resolution had not specifically identified what *was* that portion, but the conclusion is inescapable that the portion of Libya's boundary which had *not* been so delimited was the boundary between Toummo and the Sudanese border.

There is one additional factor to which I have already referred briefly which renders it somewhat difficult to depict visually the boundary situation as between Libya and what is now Chad on the critical date. On that date, French forces were physically occupying not only the borderlands

but also the Fezzan. There was therefore no need to distinguish sharply at that time between territory subject to the administrative control of one State and territory subject to the administrative control of another State. It was indeed the French military who were the *de facto* occupying forces in the borderlands and also in the Fezzan.

The "photograph" of the situation on the critical date is accordingly, to all appearances, a photograph of *de facto* French military control of all the territory now in dispute between Libya and Chad. But that photograph is not an accurate representation of the actual *boundary* situation.

The actual boundary situation has to reflect the *absence* of any agreed boundary between France and Italy which could have become binding on Libya, as regards that portion of the boundary between Toummo and the Sudanese frontier. In other words, the metaphor might be more illuminating in the particular circumstances if what were being sought was an "X-ray" photograph rather than a simple two-dimensional image.

So Mr. President, I now turn to the third and final part of my statement this morning. This addresses the issue of whether the conduct of any State prior to the achievement of Libya's independence in 1951 could have resulted in the establishment of a boundary east of Toummo which would be, or would have been, opposable to Libya. Chad has sought to argue *inter alia* that France succeeded in consolidating her title over the disputed borderlands as a result of Italian acquiescence in and recognition of the 1919 line as the boundary dividing Libya from French Equatorial Africa. Libya submits that this line of argument is wholly untenable as a matter of law and is, in any event, contradicted by the facts.

Let us analyse the law first. Libya has no difficulty in principle with the proposition that acquiescence can operate to confirm an asserted boundary, or even to perfect a claimed title to territory. In this context, Libya would endorse the following analysis made by the Chamber of the Court in the *Gulf of Maine* case:

> "The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle." (*I.C.J. Reports 1984*, p. 305, para. 130.)

If indeed acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, then it is very difficult to see how, *before* having achieved her independence, Libya could possibly have "tacitly recognized" by her "unilateral conduct" the boundary claimed by Chad to exist east of Toummo. Libya would submit, as a matter of law, that the notions of acquiescence and estoppel can be invoked only where the State whose conduct is in issue is identical with the State alleged to have acquiesced in a particular situation or to be estopped from denying a particular conclusion. In other words, there can be no State succession as regards conduct which might justify a plea of acquiescence or estoppel. The reasons, Mr. President, for so limiting the operational scope of the notions of acquiescence or estoppel are obvious. In the first place, the principle of good faith, from which, as the Court has indicated, the concepts of acquiescence and estoppel derive, demands that a successor State should not be saddled with the adverse consequences of the conduct of its predecessor State. In the second place, the very notions of acquiescence and estoppel presuppose that the conduct alleged to constitute acquiescence or to have given rise to an estoppel is the conduct of the respondent State in the proceedings, and not the conduct of some other State. In the third place, in so far as the notions of acquiescence and estoppel reflect the general interest of the international community in discouraging States from blowing "hot and cold" on particular issues at different times, they can have no application when the State which has blown "hot" at one time is not identical with the State which has blown "cold" on the same issue at another time. To these reasons we can add perhaps the following consideration. A boundary treaty between two neighbouring States is designed to create rights *in rem*. But conduct vis-à-vis another State, even conduct capable of being construed as acquiescence in a particular line as a boundary line, can hardly be creative of rights *in rem*. It may, and indeed often does, create a relationship with that other State sufficient to justify a plea of acquiescence or estoppel if subsequently, in proceedings between the two States, the conduct is invoked as amounting to a particular representation on which the other State may have relied. But such a plea is, in Libya's submission, only admissible *inter partes* — that is to say, in relations between the State having made the alleged representation by conduct and the State for whose benefit it was made.

Now, we know that Chad's acquiescence argument, so far as it relates to conduct prior to the critical date, is based upon acquiescence and tacit recognition by *Italy* of French title to the borderlands, and consequently of the so-called 1919 line as the boundary between Libya and what is now Chad. But by what magic can the conduct of Italy at any time between 1900 and 1951 be attributed to an independent Libya?

Of course, it is accepted law — Libya does not dispute this — that France and Italy could have entered into a treaty which would have fixed the boundary between Libya and what is now Chad, and that this boundary would then have become binding on Libya at independence by operation of law. This indeed is precisely what would have happened had instruments of ratification of the 1935 Treaty been exchanged by France and Italy, since the 1935 Treaty line would thereupon have been constituted as the boundary between Libya and what was later to become Chad. But this did not happen. And it is one thing to apply a recognized rule of international law providing for succession of States as regards boundaries established by treaty. It is quite another thing to attribute to a newly independent State the conduct of its colonial predecessor as giving rise to the establishment of a boundary by acquiescence. The conduct required to sustain a plea of acquiescence must, in Libya's view, be the *personal* conduct of the State alleged to have acquiesced in the particular situation. And, as the Court will be aware, there can be no succession — no automatic succession — in respect of rights *in personam*.

That this is so is confirmed by the emphasis put on the *knowledge* of the State alleged to have acquiesced in the rights or title being asserted by the other State. An essential element of any plea of acquiescence is that the State concerned should have had knowledge of the rights or title being asserted. The Court will recall that, in its Judgment in the *Anglo-Norwegian Fisheries* case, it referred *inter alia* to "the notoriety of the facts" as being a factor which could evidence United Kingdom acquiescence in the Norwegian straight baseline system (*I.C.J. Reports 1951*, p. 139). The Court will likewise recall that, within the framework of the law of treaties, *knowledge* is stated to be an essential requirement of any plea of acquiescence. Thus, Article 45 of the Vienna Convention on the Law of Treaties provides, in pertinent part, as follows:

"A State may no longer invoke a ground for invalidating, terminating,

withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, *after becoming aware of the facts*:

. . . . . .

it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

In the present case, how can it possibly be argued that, prior to the achievement of her independence, Libya had knowledge of the facts which might support a claim that *Italy* had acquiesced in the so-called 1919 line as the boundary between Libya and what is now Chad? Even if there is a place in international law for constructive (as opposed to actual) knowledge — and I do not seek to argue that point — the burden is still on Chad to establish that Libya was in fact informed of the French (and later Chadian) claim to title and also of the precise boundary line for which Chad now contends. But we know that as of the end of 1951, Libya's actual knowledge of the complex history of her alleged southern boundary was extremely sparse and was largely limited to the boundary study prepared by the United Nations Secretariat in January 1950. That boundary study, read in conjunction with General Assembly resolution 392 (V), would undoubtedly have created the impression that Libya's southern boundary still remained to be delimited by negotiation between France and Libya.

On legal grounds alone, therefore, Libya contends that *Italian* conduct prior to 1951 cannot properly be attributed to Libya so as to support a claim that Libya must be presumed to have acquiesced in the so-called 1919 line as the boundary between Libya and what is now Chad.

In any event, as I have already indicated, the Chadian argument, so far as it is based on a plea of *Italian* acquiescence pre-1951 in the 1919 line is wholly unsustainable on the facts. It is indeed somewhat difficult to extract from the written pleadings of Chad the grounds upon which this claim of Italian acquiescence is based. A rich admixture of arguments is advanced. Each and every one of these arguments is without foundation, as has been amply demonstrated in paragraphs 4.73 to 4.149 of the Libyan Counter-Memorial, as supplemented by paragraphs 6.42 to 6.66 of the Libyan Reply. Thus, there is no substance in the Chad contentions that, by virtue of the Franco/Italian Accords of 1900 and 1902:

(a) Italy had recognized a French zone of influence extending up to the Tripolitanian boundary;

(b) Italy had accepted the 1899 south-east line as shown on the Non-Annexed Map;

(c) Italy had accepted the Tripolitanian boundary; and

(d) Italy had renounced the rights of the Ottoman Empire.

Then we have the argument advanced in the Chad Counter-Memorial that, whatever the position may have been in consequence of the Franco/Italian Accord of 1902, Italy had in any event renounced definitively her right to invoke the Ottoman claims by way of inheritance by relying exclusively on Article 13 of the Treaty of London of 1915 and on her protests against the Anglo/French Convention of 1919 in negotiating with France over Libya's southern boundary between 1920 and 1934. The weakness of this argument is self-evident. To invoke a particular conventional provision as a basis for negotiations by no means implies the abandonment of other grounds for asserting a territorial claim. As Professor Cahier has amply demonstrated, it is in any event beyond dispute that Italy never showed any inclination to abandon or renounce her Ottoman inheritance. I would simply point out that in the 1934 negotiations with Great Britain, for example, Italy specifically relied on her Ottoman inheritance as providing the legal basis for her claim to the territory comprised in the Sarra triangle (see ML, para. 5.291). There is also clear evidence that in the discussions between Ambassador Beaumarchais and Mussolini in 1928 and 1929, Mussolini specifically invoked the territorial rights in respect of Libya which Italy had inherited from the Ottoman Empire (see Ambassador Beaumarchais' notes of the meeting of 31 May 1929 reproduced at Supplementary Annex No. 5.4 to the RL).

Chad also invokes the so-called "Jef-Jef" incident of 1938 as demonstrating that Italy accepted France's claim to sovereignty over the so-called Aouzou Strip and recognized the 1919 line as a boundary at a point in time when both parties knew that the 1935 Treaty boundary would not take effect. Professor Condorelli has already exposed all the flaws and inaccuracies in Chad's account of this very minor incident, so there is no need for me to go over the ground again.

Finally, we have the repeated allegations of Chad that Italy and indeed Libya must be taken to have acquiesced in the boundary claimed by Chad because of the failure of both countries to react,

whether within the United Nations or outside the United Nations, to French statements between 1949 and 1952 asserting or clearly implying that the southern boundary of Libya with French territory corresponded to the 1919 line. These allegations are most forcefully expressed in Chapter V of the Chad Memorial (MC, paras. 97-104). The plain fact of the matter is that these allegations are manifestly ill-founded. In the first place, they proceed from the assumption that France had advanced, in the United Nations deliberations on the question of Libya's boundaries, a clear and consistent position as to the course of Libya's southern boundary east of Toummo. Now this assumption, as Libya has already demonstrated, is misconceived. The written pleadings unquestionably demonstrate that the French representatives in the Four-Power Commission, the Committee of Seventeen and the *Ad Hoc* Political Committee had, no doubt upon instructions from Paris, committed a series of blatant errors in presenting the French position on Libya's boundaries. Not only had France misinformed the Four-Power Commission, and later the General Assembly, about the existence of a Franco/Italian Protocol of 1924; France had also repeated to the General Assembly the wholly false claim that there had been a map annexed to the Anglo/French Additional Declaration of 1899. France was in addition presenting a wholly misleading account of the geographical scope and legal effect of the Franco/Italian Accord of 1902. Admittedly, the French representative to the *Ad Hoc* Political Committee had sought to correct the earlier false information about the mythical Franco/Italian Protocol of 1924; but in doing so, he succeeded in repeating some of the other misstatements. Accordingly, the premise upon which Chad bases her complaints about the alleged silences of Italy and Libya in the United Nations debate — the premise that France had made a clear and unequivocal declaration of her position on Libya's southern boundary — is fundamentally flawed.

But even if this were not the case, the Chadian argument would still be unpersuasive. Chad seems to be under the impression that, between 1948 and the end of 1951, the status of Italy and Libya within the United Nations was equivalent to that of France. But, at the time, and of course even today, France was a permanent member of the Security Council, enjoying the privileges and prestige attaching to that status. Italy was not even a Member State of the United Nations. She was

an ex-enemy State in terms of United Nations parlance. She may have enjoyed observer status and been entitled to participate in United Nations debates. But Italy had, by this time, been obliged, by virtue of Article 23 of the Italian Peace Treaty of 1947, to renounce all rights and title to former Italian territorial possessions in Africa, including Libya. So there was no perceived need for the Italian observer delegation in New York to challenge French statements about Libya's southern boundary. Certainly, there was no perceived need in terms of protecting Italian interests. The Chad complaint about the alleged silences of Libyan representatives is even less convincing since, of course, between 1948 and 1951, Libya was still under foreign military occupation and administration. So Libya was not, and could not have been, directly represented in New York. She was therefore in no position to challenge the French statement. It may be for this reason that Chad seeks to rely on the alleged silences of the United Nations Commissioner for Libya in his First and Second Reports to the United Nations General Assembly of 1950 and 1951 respectively. Quite why these Reports should be regarded as having any significance at all in this context is unclear, given that Chad openly concedes that "boundary questions did not fall within the framework of the Commissioner's mandate" (MC, Chap. V, p. 229, para. 87).

Now, Mr. President, Members of the Court, there is accordingly no substance in any of the Chad arguments that Italian or Libyan conduct prior to the achievement of Libya's independence in 1951 could, as a result of the acquiescence of either of these powers, have resulted in the fixing of a boundary east of Toummo between Libya and what is now Chad. The arguments are fanciful and they are ingenious. But, when tested against the facts and the law, they begin to crumble and eventually disintegrate. They are reminiscent of that "insubstantial pageant" which, Shakespeare reminds us in *The Tempest*, will dissolve leaving "not a rack behind".

Mr. President, Members of the Court, I thank you very much for your close attention. Professor Cahier will now review the relations between Libya and Chad from 1960 onwards.

The PRESIDENT: Thank you, Sir Ian. Mr. Cahier.

M. CAHIER : Monsieur le Président, Messieurs les juges.

L'objet de ma plaidoirie d'aujourd'hui est d'examiner dans quelle mesure les relations entre la Libye et le Tchad, à partir de l'indépendance de ce dernier, peuvent soit confirmer notre thèse d'après laquelle il n'y a pas eu de délimitation de frontières, soit jeter une lumière nouvelle sur le problème posé à la Cour.

Sans doute il n'est pas dans mes intentions de sous-évaluer ce qui a été fait au cours de la période coloniale et dit à ce sujet, mais il me semble que la manière dont ces deux nouveaux Etats ont assumé leur héritage mérite d'autant plus d'être pris en considération qu'ils sont directement concernés. Leur comportement est donc important pour permettre de trancher le différend territorial qui vous est soumis.

Nos honorables contradicteurs ont voulu, à tort, examiner les relations entre les deux Etats Parties à l'actuel différend à la lumière de l'acquiescement. D'après eux, d'un côté nous avons la Libye qui, face à une situation juridique soit-disant claire, garde non seulement le silence, mais encore est incapable d'exprimer ses prétentions de manière précise, de l'autre côté le Tchad qui au contraire a toujours la même ligne de conduite.

La vérité est différente et davantage nuancée. En portant son argumentation sur ce terrain, le Tchad a pris le risque de voir sa thèse se retourner contre lui, car s'il y a incohérence dans le comportement des Parties, celle-ci est à attribuer au Tchad et non à la Libye.

Ecartons tout de suite trois arguments développés par le Tchad dans ses écritures. D'après le premier (mémoire du Tchad, p. 320-321; contre-mémoire du Tchad, p. 147 et suiv.) si la Libye avait des prétentions sur la zone contestée, elle aurait dû les indiquer lors de l'accession du Tchad à l'indépendance et lors de son admission au sein des Nations Unies. Nous l'avons dit et répété, l'accession à l'indépendance d'un nouvel Etat est une occasion de se réjouir et non pas de susciter des querelles. Cela est d'autant plus vrai lorsque cela se passe dans le continent africain qui a tant souffert du colonialisme. Reprocher aujourd'hui à la Libye son attitude de 1960 manque singulièrement d'élégance. Il est vrai que le Tchad a cité dans ses écritures (contre-mémoire du Tchad, p. 155 et suiv.) des cas d'Etats ayant adopté une attitude inverse, mais il a été incapable de prouver qu'il existerait une obligation juridique de formuler une objection à un moment pareil.

Le deuxième argument tchadien porte sur le fait que dans la période qui va de 1960, date de l'indépendance tchadienne, à 1966, la Libye aurait dû faire valoir ses prétentions puisqu'elle ne pouvait pas ignorer la présence du Tchad dans la région contestée.

Mais quelle présence tchadienne, Messieurs les juges, dans la zone en question ? En vérité à l'époque, si présence il y a dans cette zone, elle est française.

En vertu de l'accord de défense de 1960 entre la France et le Tchad, ce sont toujours des troupes françaises qui sont là. L'indépendance du Tchad n'a guère changé la situation. Pour la Libye qui n'avait pas eu d'expérience heureuse avec la France, nous l'avons vu, et qui était un jeune Etat, faiblement développé, il n'était pas question d'élever la voix. Alors le Tchad nous dit, dans sa réplique (p. 104, par. 4. 29) :

> "Un Etat souverain doit agir de façon responsable : s'il a lui-même des revendications, il lui appartient d'agir en conséquence et de les faire valoir."

Agir de façon responsable, Messieurs les juges, arrêtons-nous un instant sur ces termes. Si la Libye dans les années soixante est sans doute un Etat souverain, avait-elle pour autant les moyens d'agir de manière responsable ? Avec la poignée de juristes à l'échelle nationale, que nous a décrit M. Maghur, disposait-elle des moyens adéquats pour examiner une situation juridique des plus compliquée ? Cette insuffisance de moyens est reconnue par la France puisque l'on s'en souvient, en expliquant au Parlement la raison du retard dans la négociation du traité de 1956, le secrétaire d'Etat français aux affaires étrangères disait :

> "C'est en juin que nos experts devaient se rendre à Tripoli. Que s'est-il passé ? Il s'est passé ... que la Libye n'avait pas d'expert, qu'elle a dû en chercher en Suisse, et qu'au dernier moment, cet expert s'est trouvé indispensable." (Réplique de la Libye, p. 269.)

En vérité, Messieurs les juges, l'indépendance n'est pas un état magique qui permettrait aux Etats du jour au lendemain de devenir pleinement autosuffisants, d'acquérir un développement économique, social et culturel, bref de pouvoir être comparés, au moment où ils accèdent à l'indépendance, à des Etats souverains depuis plusieurs siècles. L'indépendance n'est qu'une grande porte ouverte devant laquelle se déroule une longue route que le nouvel Etat devra parcourir la plupart du temps lentement et avec difficulté.

Le Tchad en sait quelque chose, lui qui devra faire appel à de nombreuses reprises à des troupes étrangères. Alors pourquoi reproche-t-on à la Libye son ignorance d'un dossier très complexe qui remonte à 1899 ?

Ne l'oublions d'ailleurs pas, pour la Libye, de toute manière, le traité de 1955 n'avait pas délimité la frontière sud, la question restait toujours ouverte, car elle ne pouvait être résolue qu'après un examen de la situation juridique. A défaut de moyens adéquats, cet examen ne pouvait prendre que du temps, et c'est d'ailleurs au fur et à mesure d'une meilleure connaissance du dossier que la Libye précisera ses revendications.

Le troisième argument du Tchad porte sur l'accord de bon voisinage et d'amitié conclu avec la Libye le 2 mars 1966. On a eu l'occasion de le dire dans le cadre de notre mémoire (mémoire de la Libye, p. 416-420), si cet accord utilise le terme de frontière, il n'en donne aucune définition; il ne se réfère même pas à l'article 3 du traité de 1955, contrairement à l'article premier du traité de 1955 de bon voisinage entre la France et la Libye. Il n'y a pas eu en 1966 de négociation sur les frontières ni avant ni après la conclusion du traité.

Le traité de 1966 a un but tout à fait pratique. En l'absence d'une délimitation de la frontière, il fallait assigner aux deux pays des tâches pour le maintien de l'ordre dans certaines régions sur lesquelles les droits étaient indéterminés, ainsi que des facilités de circulation pour les populations locales.

Dès 1966 des troubles éclatent au Tchad, qui mènent à la création du front de libération national tchadien (le Frolinat). D'après le mémoire tchadien (p. 34, par. 77) :

> "A partir de 1968, le pouvoir central tchadien, dirigé à l'époque par François Tombalbaye, perd le contrôle d'une partie importante du BET. En particulier, une révolte des gardes nomades d'Aouzou en mars 1968 est à l'origine de l'évacuation définitive du poste par l'armée nationale tchadienne à partir du mois de septembre de la même année."

Le Tchad a insisté sur l'intervention de son représentant à la vingt-sixième session de l'Assemblée générale des Nations Unies le 6 octobre 1971 (mémoire du Tchad, p. 323-324). On peut se demander pourquoi. En effet, en la lisant attentivement, l'on voit que cette intervention

porte essentiellement sur une prétendue ingérence libyenne dans les affaires intérieures tchadiennes qui aurait consisté en une assistance aux forces du Frolinat, ainsi qu'en la demande libyenne que le Tchad rompe ses relations diplomatiques avec Israël.

Tout cela ne concerne pas la frontière sud de la Libye. Toutefois le représentant du Tchad accusait aussi la Libye d'intention expansionniste. Il en voyait la preuve dans une carte routière imprimée et vendue en Italie, qui faisait passer la frontière au dépens du Tchad.

Négligeons ici la réponse du représentant libyen relative à l'ingérence dans les affaires intérieures tchadiennes (mémoire de la Libye, p. 281 et 282); la réponse et le problème ne sont guère pertinents pour la solution de notre différend. Quand à la carte, je demande Messieurs en quoi une carte touristique, au surplus imprimée et vendue en Italie, pouvait concerner la Libye. Ainsi à juste titre son délégué a déclaré : "Cette carte ne fixait aucunement la frontière entre nos pays." (Nations Unies, *Documents officiels de l'Assemblée générale, vingt-sixième session, séances plénières*, 1963, séance, 12 octobre 1971, par. 208.)

Et l'on vient nous dire aujourd'hui qu'il y avait là une belle occasion pour la Libye de faire valoir sa position juridique sur la frontière entre les deux pays. Mais pourquoi ce jour-là à l'Assemblée ? Il n'y avait pas le moindre débat sur les frontières, mais uniquement une carte d'origine italienne dont la Libye n'était aucunement responsable.

Par contre ce qui est curieux c'est qu'au cours de cette séance le représentant tchadien n'ait pas évoqué la présence libyenne dans la région. En effet, si c'est seulement à partir de 1973 qu'une administration s'y installe, le Tchad, dans une lettre adressée au Conseil de sécurité le 21 mars 1983 (supplément S/15649), a affirmé que des troupes libyennes s'y trouvaient déjà en 1971. Si donc cet Etat estimait que cette région relevait de sa souveraineté, comment est-ce possible qu'il n'ait formulé aucune protestation ?

Mais laissons là cette année 1971.

L'année 1972 est nettement plus intéressante. C'est l'année qui voit la lettre du président Tombalbaye et la conclusion d'un traité entre la Libye et le Tchad.

Dans sa réplique (p. 271), la Libye a analysé le contenu de cette lettre du 28 novembre 1972, adressée au président de la Libye. Lettre significative, car elle dit :

"En ma qualité de Président légal du Tchad, je tiens à vous affirmer que la bande d'Aouzou a été et sera, sans aucun doute, partie intégrante du territoire libyen."

Significative — disais-je — cette lettre l'est a un double titre. D'abord, parce que le chef de l'Etat tchadien reconnaît que le traité de 1955 avec la France n'a pas établi de frontière entre la Libye et le Tchad. En effet, si tel avait été le cas et compte tenu de la thèse tchadienne d'aujourd'hui qui situe, sur la base du traité de 1955, cette bande en territoire tchadien, le président n'aurait pas pu écrire : "a été ... partie intégrante du territoire libyen".

Significative encore à un second titre, car cette lettre a pour conséquence l'abandon de toute revendication future du Tchad dans cette région. Ainsi, même si le Tchad pouvait croire avoir des droits sur cette région, le chef de l'Etat renonce à les faire valoir. Cela résulte clairement du texte de la lettre dans l'emploi des termes :

"*sera* ... partie intégrante du territoire libyen".

Il va sans dire qu'une telle déclaration d'un chef d'Etat engage l'Etat qu'il représente et cela quels que puissent être les changements qui pouvaient intervenir par la suite à la tête de l'exécutif.

On comprend que ce texte ne plaise pas à nos honorables contradicteurs, qui avaient déjà souligné dans leur mémoire qu'en l'absence de son original on pouvait avoir des doutes sur la valeur probante de cette lettre.

Aujourd'hui ils reviennent à la charge avec le dépôt, auprès du Greffe de la Cour, le 9 février 1993, dans le cadre d'une procédure d'instruction publique, d'un volumineux document constitué par des témoignages de soi-disant proches collaborateurs de l'ancien président Tombalbaye.

Monsieur le Président, Messieurs les juges, M. Kamel Maghur a déjà examiné en détail les témoignages et je ne vais pas y revenir, mais je dois dire que j'ai une assez grande méfiance à l'égard des témoignages en général, et tous les enquêteurs vous diront qu'il faut les traiter avec grande prudence. Dans le cas d'espèce, en formulant mes doutes, je ne veux en aucune manière contester l'honorabilité des témoins. Mais nous savons tous que la mémoire est faillible. Il s'agit, après tout, d'événements qui se sont déroulés il y a vingt ans et j'avoue que personnellement j'aurais quelques difficultés à me souvenir avec précision de ce qui s'est passé il y a vingt ans.

Cela dit, si on examine le contenu de la lettre, son existence est loin d'être invraisemblable. Tout d'abord, en reconnaissant que la bande d'Aouzou appartient à la Libye, le président Tombalbaye ne fait, somme toute, que confirmer le communiqué de presse du 7 janvier 1935, auquel s'est référé M. Condorelli hier, qui indiquait que les territoires situés au nord de la ligne prévue à l'article 2 du traité de 1935 étaient les "territoires ainsi reconnus comme appartenant à la Libye". Si les termes ont un sens, il s'agissait bien à l'époque non pas d'une cession, mais d'une reconnaissance de souveraineté. Tombalbaye, trente-sept ans plus tard, en prend acte et accepte cette situation juridique.

Pour des raisons évidentes le président tchadien, à la suite de la rupture des relations diplomatiques, entend rétablir de bons rapports avec la Libye. Le 28 novembre 1972, une réunion du gouvernement et du bureau national du parti progressiste eut lieu, au cours de laquelle il fut décidé de rompre les relations diplomatiques avec Israël, ce qui était un des chers désirs de la Libye, comme nous l'avons vu en examinant les débats à l'Assemblée générale en 1971.

Dès le début de sa lettre donc, le président tchadien informe son homologue libyen de cette nouvelle situation, et il ajoute :

> "Au moment où j'exprime le désir de voir se développer notre coopération, permettez-moi de vous inviter à bien vouloir faire cesser le soutien que vous apportez aux hors-la-loi (le Frolinat) qui portent les armes contre le pouvoir légal du pays et essayent de diffuser des rumeurs selon lesquelles notre Gouvernement a des ambitions sur Aouzou dans le but de nuire à notre rapprochement et de porter atteinte à notre coopération."

Il me semble que tout se tient : nous (Tchadiens) avons donné suite à vos désirs, maintenant en "contrepartie" cessez, vous (Libyens) d'appuyer des rebelles. Et le Président d'ajouter que de toute manière des rumeurs sur la bande d'Aouzou ne l'intéressent pas de quelque nature qu'elles soient. Entendons-nous bien, le président ne dit pas de qu'il cède à la Libye un quelconque territoire, il reconnait simplement qu'il ne conteste pas les droits de la Libye sur ce territoire.

Deux faits rendent vraisemblable l'existence de la lettre du Président tchadien. Tout d'abord, d'après les témoignages découlant du document déposé par le Tchad, il apparaît que lors des réunions tchado-libyennes, en décembre 1972, il n'a pas été question de la zone d'Aouzou.

Le témoignage de M. Baroum Beb Jegglen, qui faisait partie de la délégation présidentielle qui s'était rendue à Tripoli en décembre 1972, dit que dans les négociations de l'époque l'on avait créé trois commissions mixtes : sécurité, politique, économie finances. Et il ajoute :

> "J'ai eu à présider la commission de politique générale; que ce soit dans les débats des deux délégations, ou dans les conclusions finales, il n'a jamais été question de la bande d'Aouzou."

Monsieur le Président, Messieurs les juges, loin de moi l'idée d'invoquer des témoignages lorsqu'ils nous sont favorables pour en rejeter d'autres lorsqu'ils vont à l'encontre de nos thèses, car les uns et les doivent être pris avec circonspection.

Si j'ai évoqué ce dernier témoignage c'est parce qu'il y a une logique entre les circonstances historiques. En effet, pourquoi évoquer dans les discussions de décembre 1972 la région d'Aouzou puisque la souveraineté sur celle-ci a été admise par le Tchad qui a renoncé, en novembre, à la contester ?

Oublions maintenant les témoignages qui ne vont pas vous aider à résoudre le différend qui vous est soumis, il reste un accord international — un *fait* — qui va dans le sens de notre thèse. Il s'agit de l'accord de décembre 1972 intitulé traité d'amitié, de coopération et d'assistance mutuelle. En vertu de cet accord la Libye et le Tchad s'engagent à encourager et à développer leur coopération dans différents domaines : économique, financier, commercial, technique, culturel, etc. Il n'y a dans ce traité aucune référence à un problème relatif aux frontières des pays co-signataires. Cette omission ne peut s'expliquer que parce que la Libye a été assurée de son bon droit dans la bande d'Aouzou et le Tchad a montré qu'il n'avait pas de prétentions dans cette région ou que, s'il en avait eu, il y avait renoncé. La lettre du président Tombalbaye est un maillon logique de la chaîne de ces événements.

Mais par hypothèse, admettons que cette lettre n'ait jamais existé. Il faut alors que nos honorables contradicteurs nous expliquent comment est-ce possible — puisque d'après eux le traité de 1955 délimitait la frontière sud entre la Libye et le Tchad — qu'en décembre 1972, lors de la

visite et des discussions des Tchadiens à Tripoli : 1) les Tchadiens n'aient pas protesté contre la présence libyenne dans la bande d'Aouzou; 2) qu'ils aient signé un traité d'amitié, de coopération et d'assistance mutuelle avec un Etat qui occupait leur territoire ?

Par ces faits, on ne saurait mieux souligner la contradiction évidente entre l'attitude du Tchad en 1972 et celle de cet Etat, aujourd'hui, Messieurs, devant votre haute juridiction.

Mais en examinant des événements postérieurs nous allons voir que le Gouvernement du Tchad n'est pas en mesure d'expliquer d'autres contradictions.

S'il pouvait y avoir des doutes sur la présence libyenne à partir de 1971 (mais c'est pourtant le Tchad qui l'affirme en 1983 dans sa lettre déjà citée au Conseil de sécurité), il n'y en a sûrement plus en 1973. A cette date, on l'a dit, il ne s'agit plus de quelques forces militaires, mais d'une véritable administration civile. Le Tchad le reconnaîtra devant l'Assemblée générale des Nations Unies en 1977 (trente-deuxième session, séance du 7 octobre, par. 45) : "Les autorités libyennes y ont mis toutes les structures de leur administration."

Cette présence, Messieurs, est pacifique, elle ne se heurte à aucune protestation tchadienne, elle est en outre publique. J'en vois la preuve dans le témoignage de l'ambassadeur de France au Tchad, qui rapportait pour le 27 mai 1974 :

> «Aouzou est maintenant dotée d'une garnison militaire sans avoir pour autant entraîné une réaction du gouvernement de Tombalbaye." (R. L. Touze, *370 jours d'un ambassadeur au Tchad*, Paris, 1989, p. 74.)

Ce témoignage tend à accréditer l'existence de la lettre du 28 novembre 1972. Pourquoi, en effet, le Gouvernement tchadien réagirait-il à la présence libyenne puisqu'il a admis un an auparavant la souveraineté de la Libye sur ce territoire ? Mais, même en l'absence de cette lettre, le traité de 1972 et l'absence totale de protestations de la part du Tchad en 1973 et en 1974 sont une preuve de l'acquiescement de cet Etat à la présence libyenne. En ce sens on peut citer le communiqué tchado-libyen du 7 mars 1974 lors de la visite du colonel Kadhafi à Fort-Lamy :

> "Le président N'Gorta Tombalbaye a tenu à remercier son collègue libyen et le peuple de Libye pour l'aide efficace qu'ils apportent pour le développement du Tchad."

Un tel communiqué conjoint est difficilement imaginable si l'un des deux Etats estimait que les

forces militaires de l'autre pays occupaient à tort une partie de son territoire. A cela on pourrait objecter que le Président tchadien, soucieux de l'intérêt économique de son pays et désireux de voir se poursuivre l'aide libyenne, ait préféré ne pas soulever le problème des frontières. Mais le droit international, comme d'ailleurs le droit interne, ne se soucient pas des arrières-pensées des hommes d'Etat et ne tiennent compte que de leurs déclarations publiques. Celles-ci sont d'ailleurs confirmées par le traité du 12 août 1974 (mémoire de la Libye, "International Accord and Agreements", annexe n° 35). Il y a une continuité parfaite entre les événements de 1972 et ceux de 1974. Cet accord, après avoir insisté sur le désir de renforcer les liens d'amitié entre les deux pays, ajoute à son article 1er :

> "The two sides emphasize their intention to maintain full co-operation in the light of the historical connections between their fraternal people",

et à l'article 2 :

> "The frontiers between the two countries is a colonial conception in which the two peoples and nations had no hand, and this matter shou'd not obstruct their co-operation and fraternal relations."

Ce traité est intéressant à un double point de vue. Tout d'abord il montre que la présence libyenne dans la bande d'Aouzou n'est, une fois de plus, pas contestée par le Tchad. On ne conclut pas un traité d'amitié dans lequel on souligne le caractère fraternel des relations entre les deux Etats lorsqu'un des deux occupe de manière illicite une partie du territoire de l'autre. Ensuite l'article 2 de cet accord prouve qu'il existe toujours un problème de frontière entre les deux Etats, problème qui découle d'une conception coloniale, mais qu'il ne saurait faire obstacle à des relations fraternelles entre les deux pays.

Or, ce problème de frontières qui subsiste ne peut pas viser la bande d'Aouzou, car puisque l'administration libyenne s'y trouve, si le Tchad avait des revendications sur ce territoire, le traité n'aurait pas souligné cet aspect de caractère fraternel des relations entre les deux Etats.

Donc, si problème de frontières il y a, celui-ci ne peut que concerner un autre secteur. Dès lors, l'accord de 1974 ne fait que confirmer notre thèse, à savoir que les deux Etats reconnaissent que la frontière sud reste à délimiter, indépendamment de la zone d'Aouzou qui relève de la souveraineté libyenne, et que cette délimitation se fera dans un esprit fraternel.

Si vous le permettez, Monsieur le Président, peut-être est-ce le temps de nous interrompre ?

The PRESIDENT : Thank you very much M. Cahier.

L'audience est suspendue de 11 h 15 à 11 h 30.

The PRESIDENT : M. Cahier.

M. CAHIER : Monsieur le Président, j'ai interrompu ma plaidoirie en 1974 et je me suis efforcé, en étudiant la période qui va de 1971 à 1974, de montrer que l'existence de la lettre du président Tombalbaye était vraisemblable et que de toute manière si l'on doit suivre la thèse tchadienne actuelle alors la conclusion des traités de 1972 et de 1974 n'est guère compréhensible compte tenu de la présence libyenne dans la zone d'Aouzou.

Les années passent : 1974, 1975, 1976, sans aucune protestation du Tchad, notamment au sein des Nations Unies.

En 1977 et début 1978, l'on assiste cependant à un revirement tchadien. Est-ce dû à la disparition du président Tombalbaye et à son remplacement par le président Malloum ? Est-ce parce que le Tchad continue à traverser une période de turbulences et qu'il est donc plus facile d'accuser son voisin de tous les maux, plutôt que de mettre de l'ordre dans sa maison ?

Quoiqu'il en soit, le Tchad va saisir, en juillet 1977, la conférence des chefs d'Etat et de gouvernement de l'OUA du litige frontalier. Cette saisine aura pour conséquence la constitution d'un sous-comité d'experts "chargé d'étudier le problème frontalier dans tous ses aspects".

Je souligne : "le problème frontalier dans tous ses aspects". Le problème est donc bien celui de la détermination de la frontière entre les deux Etats. Il ne se limite aucunement à la bande d'Aouzou, qui n'est pas mentionnée expressément. Cela n'est guère compréhensible si l'on devait

suivre la thèse du Tchad. En effet, les représentants de cet Etat étant présents, ils auraient dû insister pour que la tâche du sous-comité porte exclusivement sur l'examen de la présence libyenne dans ce territoire.

En fait, ce sous-comité ne fera rien pendant de longues années, plus précisément pendant dix ans, et le Tchad ne fera rien pour faire avancer les choses. Cela est dû — nous dit-il dans son mémoire (mémoire du Tchad, p. 38-39), à son affaiblissement dû à des troubles internes. Mais, est-ce qu'en 1977, lorsque le Tchad saisit l'OUA, tout allait-il pour le mieux pour cet Etat ? On peut en douter, puisque fin juin 1977, Goukouni lançait une offensive contre les postes militaires du Tibesti, tenus par les troupes gouvernementales.

En définitive, l'effort tchadien de monter en épingle le rôle de l'OUA dans notre différend est parfaitement vain. Cette organisation poursuit à juste titre, dans les années soixante-dix et pendant longtemps, un double but, d'abord obtenir l'évacuation des forces armées étrangères du Tchad et, ensuite et surtout arriver à une réconciliation des différentes factions qui se disputent le pouvoir dans cet Etat. Tout cela n'a rien à voir avec la bande d'Aouzou ni avec la frontière séparant la Libye du Tchad.

Toujours en 1977, dans le cadre du débat général à l'Assemblée générale des Nations Unies, le Tchad dénoncera les ingérences libyennes dans ses affaires intérieures et la présence de son administration dans la bande d'Aouzou.

Début février 1978, et plus précisément le 6 et 8 février (doc. S/12554 et 12555), le Tchad dénoncera à nouveau devant le Conseil de sécurité cette fois, l'intervention libyenne et l'occupation d'Aouzou, en rappelant l'absence de validité du traité de 1935.

Que répond le Gouvernement libyen dans sa lettre du 14 février 1978 au Conseil de sécurité (doc. S/12560) ? Que le différend frontalier pourrait être résolu par des négociations bilatérales dans le cadre de l'OUA.

Le 17 février 1978, lors de la réunion du Conseil de sécurité, le représentant de la Libye a déclaré :

> "Le représentant du Tchad nous a accusé d'avoir occupé Aouzou en 1973, mais ce n'est pas vrai, nous n'avons rien occupé" (Nations Unies, *Documents officiels du Conseil de sécurité*, 265e séance, par. 65),

et il ajoute :

> "Aouzou, comme n'importe quelle autre partie de la Libye, se trouve sous administration libyenne." (*Ibid.*, par. 66.)

On le voit, la Libye ne s'en cache pas, d'après elle la bande d'Aouzou est territoire libyen. Cela ne l'empêche pas d'être conciliante, puisqu'elle ajoute :

> "S'il y a un problème de frontière, la Libye est prête à le discuter avec le Tchad. Elle dit qu'elle est chez elle, le Tchad dit qu'il est chez lui. C'est donc un problème classique de frontière." (*Ibid.*, par. 67.)

Sans doute la Libye ne développe pas des arguments juridiques à l'appui de ses prétentions, ce n'est pas le moment, car le débat devant le Conseil de sécurité ne durera qu'une journée; ni le lieu d'ailleurs, ce Conseil étant un organe essentiellement politique. Le moment et le lieu seront réunis lorsque les deux Etats discuteront de ce problème de frontière, comme le souhaite la Libye.

Au surplus, toute cette affaire devant le Conseil de sécurité n'aura été qu'un feu de paille, puisque cinq jours après, le 22 février 1978, le Gouvernement tchadien lui a adressé une lettre l'informant de sa décision "de ne pas insister que le Conseil de sécurité donne suite à sa plainte" (doc. S/12572).

En vérité, ces événements montrent que le Tchad ne paraît pas intéressé par la bande d'Aouzou ou, tout au moins, s'il l'est, il ne le montre guère.

Les deux Etats rétablissent leurs relations diplomatiques et le 15 juin 1980 ils concluent un traité d'alliance et d'amitié (mémoire de la Libye, "International Accords and Agreements" annexe n° 37).

Monsieur le Président, Messieurs les juges, en juin 1980 la situation sur le terrain n'a guère changé, la Libye est toujours présente dans la bande d'Aouzou. Pourtant, le préambule de l'accord réaffirme les liens spirituels, culturels, économiques et humains qui unissent les deux pays. Quant à son contenu, le traité prévoit une alliance défensive si l'un des deux Etats fait l'objet d'agression, la possibilité pour le Tchad de faire appel à la Libye si son intégrité territoriale ou sa sécurité interne est menacée. Enfin, le Tchad s'engage à refuser l'implantation de toute base militaire étrangère sur son territoire. Ce traité n'est pas indifférent pour la solution du présent litige. Il montre en effet, et

une fois de plus, que pour le Tchad la bande d'Aouzou est bien libyenne. Autrement cet accord est incompréhensible. Puisqu'il est dit dans l'accord que le Tchad *ne doit pas tolérer sur son territoire des bases militaires étrangères*, comment expliquer la présence libyenne à Aouzou si ce n'est par le fait qu'Aouzou n'est pas en territoire tchadien ? Si Aouzou fait partie du Tchad, comment expliquer que cet Etat puisse en toute liberté conclure avec un Etat, occupant une partie de son territoire, un traité d'amitié et d'alliance ?

J'ai dit : conclure en toute liberté, car le traité de 1980 n'est pas conclu sous la menace de la force et le Tchad ne l'a jamais prétendu.

Le traité du 6 janvier 1981 entre les deux Parties ne fait que confirmer celui de 1980. Je me permettrai aujourd'hui d'en citer deux articles.

Tout d'abord l'article 8 dit :

> "Les deux parties font part de leur satisfaction totale concernant la coopération entre la Jamahiriya arabe libyenne populaire socialiste et le Tchad, coopération qui a contribué efficacement à instaurer la paix et la sécurité dans la République sœur du Tchad."

Et l'article 10 ajoute :

> "La partie tchadienne éprouve une haute considération pour l'aide apportée par la Jamahiriya au peuple tchadien et grâce à laquelle celui-ci est parvenu à mettre fin à la rébellion et à instaurer la paix et la sécurité au Tchad." (Mémoire de la Libye, "International Accords and Agreements", annexe n° 38.)

Donc, le Tchad fait part de sa *satisfaction totale* en ce qui concerne sa coopération avec la Libye et de sa *haute considération* pour l'aide apportée par cet Etat au Tchad; et cela au même moment où, si l'on doit en croire la thèse tchadienne dans le présent différend, la Libye occupait illicitement la bande d'Aouzou.

Non seulement on est loin des accusations du Tchad relatives à des interventions libyennes dans ses affaires intérieures, mais surtout les traités de 1980 et de 1981 prouvent de manière irréfutable ou bien que le Tchad n'avait jamais pensé avoir les moindres droits sur la bande d'Aouzou, ou bien que, s'il estimait en avoir, il y avait renoncé depuis longtemps. On comprend que dans l'analyse de ces deux traités les écritures tchadiennes soient passées comme chat sur braise.

Je reviendrai dans un instant sur les conséquences juridiques à tirer de cette attitude du Tchad,

mais il est rare de trouver de tels actes positifs d'acquiescement dans la jurisprudence internationale. Ce qui est étonnant, en tous les cas, c'est que le Tchad dans ses écritures ait fait grief à la Libye de ces traités qui montreraient que cet Etat n'avait pas soulevé le problème des frontières. Il va de soi que ce n'était pas à la Libye de soulever le problème étant donné sa présence pacifique dans la région, mais au Tchad de protester de cette présence au lieu de manifester sa satisfaction totale et sa haute considération.

En 1983, le Tchad va revenir sur sa position, pourtant exprimée, clairement exprimée, de 1971 à 1981.

Sa nouvelle plainte au Conseil de sécurité, du 16 mars 1983, porte toujours sur la soi-disant intervention de la Libye dans les affaires intérieures du Tchad. C'est en définitive ce qui préoccupe visiblement ce pays.

D'après le mémoire tchadien (p. 332) :

> "En 1983, l'intensité des combats au Tchad a poussé son gouvernement à demander à deux reprises la convocation du Conseil de sécurité et à présenter encore une fois son dossier à l'Assemblée générale. Bien que la plupart de ces efforts furent axés sur les activités militaires libyennes menées en profondeur en territoire tchadien, la demande relative à Aouzou continuait à être mise en avant par le Tchad en ces occasions."

Il est certain que de l'autre côté de la barre l'on aime insister sur ces prétendues interventions militaires libyennes. Même si elles étaient réelles, elles n'ont rien à voir avec le présent différend. Ces arguments sont cousus de fil blanc, il s'agit tout simplement de créer une atmosphère défavorable à la Libye. Mais si cette dernière était l'Etat expansionniste que l'on nous décrit, comment expliquer que la Libye n'est intervenue au Tchad que sur la demande de son gouvernement et qu'elle s'en est retirée en novembre 1981, dès que le Tchad le lui a demandé ?

Mais laissons cette question de côté pour revenir au différend qui nous occupe.

Il est exact qu'en 1983, dans une lettre au Conseil de sécurité, le Tchad a déposé un mémorandum dans lequel il a précisé son argumentation juridique (Conseil de sécurité, doc. S/15649 du 22 mars 1983). Il est exact aussi que la Libye n'a pas présenté à cette occasion un mémorandum semblable. Mais il serait inexact de dire qu'elle n'a pas indiqué certaines de ses revendications. Dans sa lettre au Conseil de sécurité, du 17 mars 1983 (doc. S/15646), elle affirme qu'elle n'a

aucune visée sur le territoire d'autres pays, mais elle ajoute : "La bande d'Aouzou fait partie intégrante du territoire libyen. Ses habitants son libyens." Et devant le Conseil de sécurité le délégué libyen reprendra sur ce point en déclarant : "La population d'Aouzou est libyenne et a des représentants au Congrès général populaire libyen. Elle ne veut être que libyenne." Il terminera enfin en disant : "Libya's borders during the Ottoman era were at the city of Faya." En définitive, le Conseil de sécurité a renvoyé les deux Parties à des négociations et leur a recommandé d'utiliser les mécanismes appropriés de l'OUA.

Les Nations Unies continueront, dans les années qui vont de 1984 à 1987, à recevoir les plaintes tchadiennes, qui porteront principalement, même si le problème de la bande d'Aouzou n'est pas ignoré, sur la situation interne tchadienne qui ne s'est guère améliorée.

Mais que fait l'OUA entre temps, puisque c'est à cette organisation qu'il revient, d'après le Conseil de sécurité, de s'efforcer de trouver une solution à la situation tchadienne ?

Rien du tout en ce qui concerne le différend frontalier entre les deux pays qu'un sous-comité, on s'en souvient, devait étudier. On ne saurait d'ailleurs l'en blâmer. Deux rapports de l'OUA, l'un du 28-29 avril 1987, et l'autre du 19 mai de la même année, expliquent les raisons de cette inaction. Nous nous y sommes déjà référés dans le cadre de la réplique. Cette inaction est due d'une part au drame intérieur tchadien qui avait pris le pas sur le différend frontalier, et d'autre part au refus de coopération de la Libye (contre-mémoire du Tchad, annexe 135).

Le rapport ne le dit pas, mais il est évident que l'absence de coopération n'est que la conséquence de la situation intérieure tchadienne. Mais le sous-comité (contre-mémoire du Tchad, annexe 136) rappelle aussi la carence des textes mis à sa disposition, il rappelle que deux traités conclus entre le Tchad et la Libye en 1966 et 1972 n'ont pas encore été versés au dossier et — fait à mon avis significatif — c'est l'ambassadeur de France au Gabon qui a fourni un complément de documentation.

Cela ne fait que prouver ce que la Libye a toujours affirmé, à savoir la complexité du dossier juridique du différend territorial qui oppose les deux pays, dossier qui n'a d'ailleurs été véritablement complété qu'à partir de la saisine de la Cour. Pour finir, le dialogue entre les deux Etats s'est

vraiment noué en 1988 devant l'OUA. Vous trouverez, Messieurs les juges, la synthèse des rapports I et II du comité *ad hoc* de l'OUA des 13 et 14 avril 1988 à l'annexe 293 du mémoire du Tchad.

La Libye a développé devant ce comité les grandes lignes de l'argumentation qu'elle a soumise devant votre haute juridiction, à savoir :

1) elle est à la fois l'Etat successeur de l'Empire ottoman et de l'Italie,

2) les accords de 1898, de 1899, et de 1919 ne procèdent pas à une délimitation de frontière, mais visent simplement à fixer en principe les limites des zones d'influence française,

3) le traité de 1955 n'a pas délimité la frontière entre la Libye et le Tchad, "Il ne comporte ni disposition ni caractère de délimitation précise et les documents cités en annexe sont dépourvus de pertinence faute de valeur juridique."

Le mémoire tchadien (p. 342) termine son analyse des relations entre la Libye et le Tchad après leur indépendance, tout particulièrement devant les Nations Unies, en disant que : "la Libye pendant au moins une décennie, jusqu'en 1983, a nié avoir occupé la bande d'Aouzou".

L'affirmation est surprenante. Présentée ainsi on l'impression que les Nations Unies ont été saisies chaque année du problème frontalier qui oppose les deux pays, alors que cela n'a eu lieu qu'une fois, en 1978. Or devant le Conseil de sécurité le représentant libyen a déclaré que Aouzou, comme n'importe quelle autre partie de la Libye, se trouve sous administration libyenne. A mon avis le Tchad ferait bien de nous expliquer juridiquement son comportement durant la période qui va de 1971 à 1983.

Monsieur le Président, Messieurs les juges, j'en arrive à la dernière partie de ma plaidoirie qui a justement pour objet de tirer les conséquences juridiques du comportement tchadien au cours de ces douze années. Le comportement que je viens de vous décrire ne peut s'expliquer que de deux manières : soit par le fait que le Tchad en définitive n'était pas intéressé par la bande d'Aouzou, soit qu'il a préféré y renoncer étant conscient de la faiblesse de ses prétentions juridiques. On ne saurait autrement expliquer son absence de protestation face à la présence libyenne sur ce territoire et la conclusion de différents traités d'amitié. Dans cette inaction et dans ces actes positifs, je vois

une preuve de l'acquiescement du Tchad aux prétentions libyennes.

La jurisprudence internationale donne au silence une portée juridique, il est considéré comme une manifestation de la volonté de l'Etat. Dans deux affaires, la seule inaction d'un Etat, sans l'intervention d'actes concluants, a pu être considérée comme constituant un acquiescement.

Dans l'affaire de *Grisbadarna*, à l'activité de la Suède qui établit dans la région contestée un bateau phare et des balises, a répondu l'inaction complète de la Norvège. Cette inaction a été considérée comme déterminante (Nations Unies, *RSA*, vol. XI, p. 161 et suiv.)

Cette conception se retrouve dans la sentence arbitrale rendue par Max Huber dans l'affaire de *l'Ile de Palmas*. Les actes de souveraineté, accomplis directement ou indirectement par les Pays-Bas sur cette île, avaient été occasionnels et manquaient de force.

Pourtant ces actes avaient suffi à établir la souveraineté hollandaise à l'encontre du titre espagnol, puisque de la part de l'Espagne :

> "no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Sanji Isles and their dependencies (Mangias included) has been recorded" (Nations Unies, *RSA*, vol. II, p. 868).

Cette absence de protestation équivalait, dans l'esprit de Max Huber, à un acquiescement qui aurait empêché l'Espagne d'invoquer d'éventuels droits découlant de traités antérieurs (*ibid.*, p. 869).

Votre haute juridiction a aussi pris en considération l'inaction d'un Etat et, pour ne pas vous lasser, je citerai simplement votre arrêt de 1962 relatif au *Temple de Préah Vihéar*. Face à la publication et à la communication à la Thaïlande des cartes géographiques situant le temple en territoire cambodgien répond une inaction thaïlandaise qui, dit la Cour :

> "il est clair que les circonstances étaient de nature à appeler dans un délai raisonnable une réaction de la part des autorités siamoises, au cas où celles-ci auraient voulu contester la carte, ou auraient eu de graves questions à soulever à son égard. Or, elles n'ont réagi ni à l'époque ni pendant de nombreuses années et l'on doit, de ce fait, conclure à leur acquiescement." (*C.I.J. Recueil 1962*, p. 23.)

Ainsi, l'inaction d'un Etat vaut acquiescement lorsqu'un autre Etat a le pouvoir effectif face à son comportement de menacer les droits de cet Etat, lorsque ces droits sont susceptibles d'être appréhendés. Comme le dit M. Alfaro dans l'affaire du *Temple* :

> "La passivité en face de certains faits est la forme la plus générale de l'acquiescement ou du consentement tacite. Si un Etat n'affirme pas son droit lorsque ce droit est contesté ouvertement par un autre Etat, cette carence ne peut signifier que

l'abandon de ce droit." (*C.I.J. Recueil 1962, p. 40.*)

Pour en revenir alors à notre cas, la présence libyenne dans la zone d'Aouzou commence, de l'aveu même du Tchad, en 1971 et devient parfaite en 1973, moment où son administration y est bien installée. Cette installation n'est pas le résultat d'un recours à la force. La présence libyenne est pacifique et elle est connue de tous, car il est évident que l'on ne peut acquiescer qu'à une situation que l'on connaît.

Face donc à cette présence libyenne sur un territoire que l'on nous dit tchadien, quelle est la réaction du Tchad ? Il n'y en a pas. C'est le silence. Et pourtant le président Tombalbaye se rend à Tripoli en décembre 1972 à la tête d'une nombreuse délégation; c'était bien le moment de protester et pourtant il n'en fait rien.

On pourra comparer l'attitude tchadienne à celle française dans l'affaire de l'*Ile de Clipperton*. Le 13 décembre 1897, le Mexique y envoie une canonnière et c'est le 8 janvier 1898 que la France élève une protestation. Le Tchad — lui — ne protestera auprès du Conseil de sécurité qu'en 1978, soit six ans après les faits. Et encore, seulement pendant quelques jours puisqu'il retirera tout de suite sa plainte pour la réintroduire en 1983. Pourtant les réunions annuelles de l'Assemblée générale des Nations Unies constituaient un forum approprié pour réitérer ses protestations. Il n'en fut rien.

Monsieur le Président, Messieurs les juges, le silence tchadien ne prend vraiment toute sa valeur que si on le considère à la lumière de ce que j'appellerai des actes positifs d'acquiescement.

En effet, même si un certain nombre d'auteurs, tels que Mac Gibbon dans le *British Year Book of International Law* en 1954 et 1957, Bowett dans le même annuaire en 1957, Johnson dans le même annuaire de 1950, et Sperduti dans la *Rivista di diritto internazionale* de 1961, semblent limiter l'acquiescement à un comportement passif, au silence, à une absence de protestations, je me rallierai plus volontiers à la conception exposée par Barale dans un article publié dans l'*Annuaire français de droit international* de 1965. D'après cet auteur (p. 393) :

> "L'acquiescement, tel qu'il est établi dans la jurisprudence internationale, apparaît le plus souvent comme un phénomène complexe. Il est rare, en effet, tout d'abord que les juges et les arbitres fondent l'acquiescement d'un Etat sur une manifestation unique, sur une seule attitude; chaque acquiescement est en général le résultat de la conjonction de plusieurs signes divers établissant un comportement global."

En me ralliant à cette conception, je ne veux en rien sous-évaluer l'importance du silence en tant que facteur d'acquiescement; il a été trop souvent souligné par la jurisprudence et par d'illustres auteurs.

Cependant, il est certain que le silence tchadien acquiert un tout autre poids si l'on prend en considération le comportement actif du Tchad.

La jurisprudence internationale a, à plusieurs reprises, pris en considération les actes positifs d'acquiescement d'un Etat. Pour ne pas alourdir l'exposé, je ne citerai que l'arrêt de la Cour permanente de Justice internationale dans l'affaire du *Groënland oriental*, les arrêts de votre Cour dans celles de la *Sentence arbitrale du roi d'Espagne* et, bien entendu, du *Temple de Préah Vihéar*.

Il y a tout d'abord, dans notre cas, la lettre du président Tombalbaye qui peut être avantageusement comparée à la déclaration du ministre norvégien des affaires étrangères Ihlen dans l'affaire du *Groënland oriental*. Elle constitue une belle reconnaissance de la souveraineté libyenne sur la bande d'Aouzou qui, d'après les termes de la lettre, "*a été et sera libyenne*".

Je sais bien que de l'autre côté de la barre on en conteste l'authenticité, pourtant — comme je me suis efforcé de le souligner — même en l'absence de son original son existence est plausible et explique le comportement tchadien ultérieur.

Ce comportement doit être analysé à la lumière de l'actuelle thèse tchadienne d'après laquelle la Libye occupait illégalement la bande d'Aouzou. Si l'on accepte cette thèse, le comportement tchadien est totalement incompréhensible. Tout devient par contre clair si l'on admet que le Tchad a reconnu les droits de la Libye sur la région.

Lorsque le communiqué conjoint du 7 mars 1974, à la suite de la visite du colonel Kadhafi à Fort-Lamy, déclare que le président Tombalbaye "a tenu à remercier son collègue libyen et le peuple de Libye pour l'aide efficace qu'ils apportent pour le développement du Tchad" ce n'est pas le discours d'un chef d'Etat dont une partie du territoire est occupée par des troupes étrangères. C'est au contraire un discours qui prouve qu'il n'y a pas de problème sur ce point entre la Libye et le Tchad.

Cet épisode me rappelle la visite du prince Damrong, président de l'Institut royal du Siam

en 1930 au temple de Préah Vihéar, et reçu par les autorités françaises.

"Cela appelait une réaction, que la Thaïlande n'a pas eue", dit votre Cour en 1962.

Et l'on pourrait dire aujourd'hui : "cette visite du colonel Kadhafi appelait une réaction, que le Tchad n'a pas eue".

Or, non seulement il n'y a pas eu de réaction à la présence libyenne dans la bande d'Aouzou, mais l'on prononça des remerciements à l'égard du peuple libyen pour l'aide efficace apportée au Tchad.

Ce n'est d'ailleurs pas seulement Tombalbaye qui remercie, car six ans plus tard M. Goukouni Oueddei, lors d'un voyage à Tripoli en 1980, fait part de la "reconnaissance" de "la partie tchadienne" à l'égard de la Libye pour l'aide fournie afin "d'alléger les maux de la guerre et de la destruction provoqués sur les divers fronts par la rébellion" (Christiane Alibert, "L'affaire du Tchad, 1980-1985, RGDIP, 1986, p. 353).

Pourtant, sur place, rien n'est changé : l'administration libyenne est toujours à Aouzou.

Poursuivons donc notre analyse puisque l'acquiescement est constitué par une série d'actes.

Monsieur le Président, Messieurs les juges, rassurez-vous, je ne vais pas revenir sur une analyse des différents traités conclus entre les deux Parties au présent litige, déjà faite dans notre réplique et dans la présente plaidoirie.

Ce que je veux encore souligner, c'est que pas moins de quatre traités ont été conclus dans la période qui va de 1972 à 1982, c'est-à-dire sur une durée de onze ans. Ce sont tous des traités qui soulignent l'amitié entre les deux peuples. 23 décembre 1972 : traité d'amitié et de coopération, article 2 : "The two contracting parties shall work toward strengthening their fraternal relations."

12 août 1974 : article 1 : "The two sides emphasize their intention to maintain full co-operation in the light of the historical connections between their fraternal people."

15 juin 1980 : "Treaty of friendship and alliance" entre la Libye et le Tchad. Et vous vous souviendrez qu'à l'article 7 il est dit que le Tchad ne doit pas permettre la présence sur son territoire de bases militaires étrangères. Mais alors *quid* des bases libyennes à Aouzou, si Aouzou est

Que l'on puisse conclure un traité d'amitié avec un Etat qui administre, à tort, une partie de votre territoire, cela pourrait se concevoir d'autant plus qu'il s'agit d'Etats qui manquent, du fait de leur nouvelle indépendance, de cadres qualifiés. Mais quatre traités d'amitié sur onze ans, cela est vraiment trop, et impensable si le Tchad estimait avoir des droits sur la bande d'Aouzou. Cela ne s'est jamais vu.

Toujours dans l'affaire du *Temple de Préah Vihéar*, votre Cour a estimé que la Thaïlande aurait dû, lors de la négociation avec la France des traités de 1925 et 1937, soulever le problème de la souveraineté sur la région du temple. La conclusion de ces accords a été considérée par votre haute juridiction comme une preuve supplémentaire de l'acquiescement de la Thaïlande.

Sans doute le Tchad aurait alors dû soulever le problème de la présence libyenne dans la bande d'Aouzou, mais si l'on doit s'arrêter là on en revient à l'inaction, au silence. En réalité, en concluant quatre traités d'amitié qui soulignent le côté fraternel des relations entre les deux Pays, en remerciant à diverses reprises la Libye de son aide, l'attitude du Tchad ne peut plus s'analyser dans une inaction, mais bel et bien dans une reconnaissance de la souveraineté de la Libye sur ce territoire. Peut-être, à l'origine, le Tchad pensait-il avoir certains droits dans la région, mais soit qu'il ait estimé que ces droits étaient bien fragiles, soit qu'il ait considéré qu'il ne valait pas la peine de les faire valoir, le résultat est le même. L'acquiescement est bien là, constitué à la fois par le silence, par l'inaction du Tchad et enfin par une reconnaissance certaine des droits de la Libye. Dès lors le Tchad, à partir de 1983, ne pouvait plus revenir sur cet acquiescement.

Monsieur le Président, Messieurs les juges, j'ai commencé ma plaidoirie en citant la réplique tchadienne (p. 104), qui disait : "Un Etat souverain doit agir de façon responsable : s'il a lui-même des revendications, il lui appartient d'agir en conséquence et de le faire valoir."

Alors je pose la question : quel est l'Etat qui dans cette affaire ne s'est pas comporté de manière responsable ? Est-ce la Libye qui dans les années soixante, ignorant son dossier juridique, face à la présence militaire française, dans la région, jusqu'en 1965, garde un silence prudent, ou est-ce le Tchad qui, bien que constatant que l'administration libyenne s'est installée dans la bande tchadienne ? Enfin, le 6 janvier 1981, nouvel accord dont l'article 10 montre que le Tchad "éprouve une haute considération"pour l'aide apportée par la Libye.

d'Aouzou, qu'il revendique aujourd'hui comme sienne, n'a pas formulé de protestations, mais a multiplié à l'égard de la Libye des déclarations de remerciements pour son aide et a conclu avec elle pas moins de quatre traités d'amitié et d'alliance ?

Il est maintenant temps de conclure. L'analyse des relations entre la Libye et le Tchad à la suite de leur indépendance respective montre indubitablement : en premier lieu que, même si à l'origine le Tchad pouvait imaginer d'avoir certains droits sur la bande d'Aouzou, il a renoncé par la suite à les faire valoir, et a reconnu la souveraineté de la Libye sur ce territoire; en deuxième lieu, que la Libye a réservé ses droits qui lui revenaient en tant que successeur de l'Empire ottoman. Elle l'a indiqué en 1983 devant les Nations Unies, et avec plus de détails en 1988 devant l'OUA.

Je vous remercie, Monsieur le Président, Messieurs les juges, de votre patiente attention et je vous prie de donner la parole au professeur Bowett.

The PRESIDENT: Thank you, Professor Cahier. Professor Bowett.

Mr. BOWETT:

The task of the Court

Mr. President, Members of the Court, we now turn to a quite different phase of the case. The Court has now heard the complex treaty history of the area, and it will have seen that nothing in this complex history — neither the treaties themselves nor the conduct of the Parties — established a conventional boundary. It follows from this that the Court must determine the boundary, not on the basis of treaty, but on the basis of the rules of international law that govern attribution of territory. My role this morning is to analyse the task of the Court, and it is my purpose to show that a determination of the attribution of the territory, and of the limits of the territory to be attributed to each Party, is a traditional judicial task. It is, moreover, a task which clearly falls within the competence of the Court in this case. Since the Parties are before the Court by virtue of a special agreement — the *Accord-Cadre* of 31 August 1989 — it is clear that any discussion of the Court's competence must start from that special agreement.

1. The *Accord-Cadre*

The title to the agreement refers to "the territorial dispute" (*différend territorial*). The same phrase appears in the Preamble, and three times again in Articles 1 and 2; and Article 2 *(b)* refers to "the disputed region" (*la légion litigieuse*).

The plain reading of this agreement would therefore suggest that the Court has before it a territorial dispute, and that there is a disputed region.

Not so, says Chad: the dispute is of a much more limited character. It is a "boundary dispute" rather than a territorial dispute, confined geographically to the Aouzou strip. Indeed, in its Memorial, Chad had suggested that the Court's task was even more restricted: it was to choose between one or two Treaty lines, *either* the so-called 1899-1919 line *or* the 1935 line.

Of course one can understand Chad's wish to litigate this case on its own terms, especially if this gives Chad the chance to phrase the issue in terms which will assist Chad's case. But the basic purpose of a special agreement is to allow each party to put its case in its own terms, not to restrict the issues in advance so as to favour one party.

Hence, in interpreting the *Compromis* — the *Accord-Cadre* — the Court is entitled to apply the ordinary rules of treaty interpretation, of which the primary rule is that the parties must be deemed to have given words their plain, ordinary meaning. And I submit that the meaning of "territorial dispute" is perfectly clear. But, in addition, the Court is entitled to keep in mind the "object and purpose" of the agreement, to use the words of Article 31 of the Vienna Convention on the Law of Treaties.

Now if the "object and purpose" of the agreement is to allow *both* parties to put the dispute to the Court in their own terms, as each party sees it, it cannot be right to restrict the interpretation of the agreement so as to accommodate the claims of one party only.

I do not suggest each Party has *carte blanche* in the sense that it has freedom to make *any* claim. The terms of the Special Agreement do control, and both Parties must frame their cases under the broad rubric of "territorial dispute". But it cannot seriously be suggested that Libya's case does not involve a "territorial dispute".

(i) Chad's argument that the "context" limits the scope of the dispute

What Chad really tries to do is to reject the plain, ordinary meaning of the term "territorial dispute" in favour of a very restricted meaning, i.e., a "boundary" dispute in the narrow sense of a choice between two lines. The device used by Chad is to argue that the *Accord-Cadre* must be understood "in its context" (CMC, para. 2.82). In itself, that proposition is unobjectionable: Article 31 of the Vienna Convention refers to "the ordinary meaning to be given to the terms of the treaty *in their context* . . .".

But, of course, the "context" referred to in Article 31 is the context of the treaty as a whole. It simply means that you cannot take the odd word or phrase and isolate it from the rest of the treaty: you must interpret the words "in context".

Thus, in many cases reference has been made to the Preamble of a treaty, to elucidate the meaning of a dispositive provision: cases such as *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 196, or the *Beagle Channel* Award, *ILR*, Vol. 52, p. 93, illustrate this. But the "context" may be wider. As Article 31, paragraph 2, states, it may also comprise annexes to the treaty, or agreements made in connection with the conclusion of the treaty, or any other instrument made in connection with the conclusion of the treaty but accepted by *all* the parties as an instrument relating to the treaty. Clearly, therefore, *unilateral* statements cannot be part of the context: what is required is some instrument accepted by *all* parties. And in any event the instrument must be related to the conclusion of the treaty.

By this test, what Chad chooses to regard as "the context" of the *Accord-Cadre* is plainly not so. Chad relies on unilateral statements made by Libya in the OAU between the years 1977-1987 — i.e., *before* the *Accord-Cadre* was concluded —; on statements made by non-parties, and on statements made in the United Nations between 1983-1984 (CMC, paras. 2.28-2.56).

Under no possible circumstances can such statements be regarded as part of the "context" of the *Accord-Cadre*. Indeed, they would not even qualify as part of the *travaux préparatoires* so as to assist in clarifying some ambiguity, if the phrase "territorial dispute" were to be regarded as ambiguous, which it is not.

Indeed, the position could scarcely be otherwise. In the nature of things, inter-State disputes frequently have a long history and, over the course of the years, many unilateral statements about the dispute will be made on both sides. Setting aside the case of an estoppel — which is not in issue here — it could not be right to allow such statements to control what is finally agreed in a *Compromis*, years later, between the two parties. They may, for good reasons, ignore earlier statements about the nature of the dispute — either because the statements were ill-informed, or because the parties have decided, whatever the previous statements, to define the dispute in a particular way. It may be wider, or it may be narrower, but what counts are the words actually agreed upon when the parties finally frame the terms of reference of some court or tribunal.

So we can, with absolute confidence, set aside Chad's suggestion that the so-called "context" of the *Accord-Cadre* proves that the Parties had in mind a boundary dispute limited to the Aouzou strip.

(ii) Chad's Argument that Libya's view of the *Accord-Cadre* transforms the Court's judicial role into that of an "aimable compositeur"

Chad's second argument — that Libya would have the Court act as "aimable compositeur" — is difficult to take seriously.

It surely cannot be argued that the task of determining title to territory, of dealing with *attribution* rather than delimitation, is not a judicial task. In its Counter-Memorial (paras. 2.27-2.45) Libya cited a whole series of cases to show that this cannot be so. And to that list we can now add the *El Salvador/Honduras* Judgment of 11 September 1992.

Nor can it be argued that a title based on customary law, rather than treaty, somehow becomes a title *ex aequo et bono*. Those same cases suffice to dispose of that notion. Indeed, if title derives exclusively from treaty, title would always be derivative, and the notion of an "original" title would find no place in the law. So that cannot be right.

So Chad seems to be saying one of two things: *either* that Libya is inviting the Court to "split the difference", regardless of legal rights, *or* that the criteria suggested by Libya as applicable to attribution are not legal criteria, but appeal to a loose form of "equity".

On the first hypothesis (see, e.g., CMC, paras. 12.25-12.27), the short answer is that the Court alone controls its judgment. So that, even if Libya did invite the Court to "split the difference", this could not control the way in which the Court carried out its task. The Court, as a court of law, would simply refuse to do so. It would attribute the territory, and draw the boundary, on the basis of legal right.

But in fact Libya extends no such invitation to the Court. There is nothing in Libya's submissions, or indeed in its pleadings as a whole, which can support that interpretation. Libya's submissions require the Court to judge "in application of the principles and rules of international law".

I suspect that at the root of this particular argument by Chad lies Chad's dismay that Libya's claims exceed the 1935 line. It is this that has led Chad to assume that Libya claims a great deal in order to get something, a sort of litigation strategy in which you claim the whole cake, hoping for half.

But if Chad was surprised or dismayed by Libya's claims, Chad has only itself to blame. If Chad had done its homework, and had thoroughly investigated the history of the dispute, it would have realised that when Mussolini agreed to the 1935 line he was *conceding territory to France*. Mussolini made that concession to France in return for a promise that the French would support the Italian conquest of Abyssinia. And, as you have already heard, it was France's refusal to keep that promise which led to Italy's refusal to ratify the 1935 Treaty.

Look at the original Ottoman claims. Look at the Italian claims, based on succession to the Ottoman Empire and advanced in negotiations with France between 1920 and 1934. By reference to those criteria there is nothing exorbitant about Libya's present claims, and so nothing to support Chad's suspicion that Libya is advancing a far-reaching claim purely as a litigation strategy.

If I can now turn to Chad's alternative hypothesis — that is that Libya invites the Court to discharge the task of attribution on the basis of criteria *ex aequo et bono* — I would say this.

The short answer is that, if that were so, the Court could simply ignore such criteria and restrict itself to the criteria which are firmly established in the law.

But in fact it is not so, and, if I may, I will remind the Court of the criteria Libya has suggested as applicable in this case. These have been outlined at some length in Libya's Counter-Memorial, Part IX, so I need do no more than review them very briefly at this stage.

We believe the Court has to start from the question whether a prior title to the territory existed, prior to the arrival of the French. This takes us into the whole question of the legal nature of the territory — was it *terra nullius*, or, if not, where did title lie? Professor Crawford will deal with this at length later. Now clearly, this is a legal question and in no way requires the Court to resort to equity *praeter legem*.

Following on from this, and depending on the answer the Court gives to that first question, the Court will have to choose the criteria by which to judge whether France could have acquired title. If the territory was *terra nullius*, one turns to occupation as the basis of any French title: and the question becomes whether a very limited French military presence could constitute an effective occupation of these vast areas. Again, this is a traditional, straightforward legal question.

Now if the territory was not *terra nullius*, then the question becomes whether France acquired title by right of conquest. And here the question becomes more complex, for we face not only the traditional restriction that a belligerent, occupying Power does not acquire sovereignty by military occupation, but also the new restriction, embodied in the Covenant of the League of Nations and the Pact of Paris, precluding the acquisition of title by war. So we introduce a new, temporal element, but surely the issues to be examined remain legal issues.

An additional criterion must be whether any defective French claim of title was "cured" by the recognition of, or acquiescence in, that title by the world community. Again, a perfectly respectable legal question.

In fact it is only when one turns from the question of title to an examination of the geographical *limits* to that title — in short to the question of an actual boundary — that one moves into criteria where there is even a hint of "equity".

But here one must avoid falling into the trap of assuming that every equitable consideration is *praeter legem*, and therefore requires the Court to abandon its judicial function and act *ex aequo et*

bono, or as "aimable compositeur". That is simply not the case.

In the law of maritime delimitation the Court is familiar enough with the role of equitable considerations, operating *infra legem* and not *contra legem*. But the same has been true of land boundaries, and in Libya's Counter-Memorial (paras. 9.38-9.45) we cited a string of cases drawn from the jurisprudence: the *Rann of Kutch* case, the *Eastern Greenland* case, the *Bolivia/Peru* Award and the *Guatemala/Honduras* Award.

Moreover, this Court has, in the recent past, resorted to equity *infra legem* in the context of land boundaries. In the case concerning the *Frontier Dispute* between Burkina Faso and Mali in the Judgment of 22 December 1986, the Court accepted that it had no power to decide *ex aequo et bono*, but distinguished that power sharply from equity *infra legem* (para. 28); and so, for example, found that the boundary must divide the frontier pool of Soum "in an equitable manner" (para. 150), that is in equal proportions.

The same approach was followed by the Chamber in the *El Salvador/Honduras* case in its Judgment of 11 September 1992. There the Chamber held, citing the *Burkina Faso/Republic of Mali* Judgment with approval, that:

> "being satisfied that the line of the *uti possidetis* in this area is impossible to determine, the Chamber considers it right to fall back on equity *infra legem* . . ." (*I.C.J. Reports 1992*, p. 167, para. 262).

Thus the question is whether the criteria or considerations advanced by Libya legitimately fall to be considered within the law, in a situation in which no treaty boundary exists, and when the territory is sparsely inhabited and concrete evidence of acts of administration is sparse.

Libya has referred to the conduct of the interested parties, including their position in negotiations. There can be little doubt that this contributes valid evidence to which the Court can turn.

In the *Burkina Faso/Republic of Mali* Judgment the Court took note of certain agreements resulting from negotiations within a Standing Joint Commission, which, even though never approved so as to become binding, nevertheless gave some indication of the views of the officials of the adjacent districts (the *commandants* of the *cercles*) at the time (*I.C.J. Reports 1986*, para. 147).

Reliance on the evidence of negotiations was even more pronounced in the *El Salvador/Honduras* case decided last year. In the first disputed sector of the land boundary the Chamber recalled negotiations in 1881 and 1884. Now this was *not* so as to bind a party to concessions made during negotiations — for the Chamber has consistently refused to take account of proposals made without prejudice in the interests of compromise — but rather because the Chamber: "is entitled to take account of the shared view in 1881 and 1884 of the Parties as to the basis and extent of their dispute" (*I.C.J. Reports 1992*, p. 59, para. 73). Similarly, in the fourth sector, the Chamber took account of the 1869 negotiations (para. 263), and in the final sector, of negotiations in 1972. In a sense, the value of evidence from negotiations is that it reveals consistency — or lack of it — in the positions of the parties. Provided one can set aside proposals aimed at pure compromise, what a party truly believed to be its genuine legal claim is often revealed in negotiations.

In the present case we have negotiations of that kind, namely the detailed negotiations between France and Italy between 1920 and 1934: perhaps the only real negotiations that have ever taken place over this boundary.

The validity of this criterion as a *legal* criterion is therefore well established: there can be no suggestion that this has taken the Court into areas *extra legem*.

What of geographic considerations, another criterion suggested by Libya? Do these take the Court outside the law? The idea is implausible on its face. After all, every demarcation commission has inherent power to adjust the line — that is the physical markers of the agreed line, such as pillars or monuments — to the geographical features of the terrain. The idea that this Court has less discretion than a demarcation commission is in principle unattractive. And it is clearly not accepted in the jurisprudence. To give but one example, in the recent *El Salvador/Honduras* case the Chamber faced the problem of having to establish a line over quite long distances, in difficult terrain, and it sensibly took into account the geography:

> "When therefore the very many instruments cited, even after minute examination, are found to give no clear and unambiguous indication, the Chamber has felt it right similarly to take some account of the suitability of certain topographical features to provide an identifiable and convenient boundary." (*I.C.J. Reports 1992*, p. 43, para. 46.)

The Chamber took the same view in following the line of the watershed, in the first sector (para. 101). So again, the criterion is perfectly legitimate, according to law.

Can the same be said of the human and economic considerations, invoked by Libya? It will be recalled that Libya has placed great emphasis on the fact that the people of the borderlands are Libyan people, Senoussi tribes with long-established social and economic ties to the north. Here the Court has a choice. It can follow a common, but by no means invariable, practice of past centuries in regarding delimitation as an exercise involving *territory*: so the exercise is an essentially political or geographical one, using maps as the essential tool, and one draws the appropriate lines without reference to the interests of the people who inhabit the territory. Or it can take account of the contemporary emphasis on *people*, which is reflected in the law relating to human rights and the right of self-determination of peoples. And so regard delimitation as more than an abstract, cartographical exercise, that is to say as an effort to achieve stable boundaries which, in so far as they take account of the interests of the people of the territory, offer a reasonable prospect of stability and reflect the wishes of the people.

The considerations of stability, peace and security — which Libya suggests as an additional criterion — are of much the same kind. It is hard to see how the Court, an organ of the United Nations, can ignore these considerations, which figure amongst the principal aims of the Organization in Article 1, paragraph 1, of the United Nations Charter. This is all the more so when the purpose of delimitation is to achieve long-term stability.

In the circumstances of the present case the need for the Court to take account of these considerations can be said to derive directly from the 1947 Peace Treaty with Italy (ML, Anns., Vol. 2, Ann. 26). The Four-Power Declaration, Annex XI to that Treaty, committed the Four Powers to resolving the future of Italy's colonies by "taking account of the aspirations and well-being of the inhabitants, as well as the demands of peace and security". If those considerations were relevant to the task of the Four Powers, they were equally relevant when the United Nations assumed that same task. And in so far as this Court is now faced with the final stage of that same task, those same considerations remain applicable.

But whatever view one takes on these matters, the argument by Chad that Libya's view of the Court's task requires the Court to depart from the law, and to decide *ex aequo et bono*, must be wrong. For, in final analysis, the Court is free to accept or reject the criteria proposed by Libya. And if the Court decides the criteria proposed by Libya go beyond what the law allows, it will presumably reject them. The situation is no different from the case in which, in a maritime delimitation, one party argues that a particular factor is important to the achievement of an equitable result. The Court may well disagree, and ignore that factor. But that does not mean that the party has *required* the Court to act *ex aequo et bono*. Moreover, all this really has nothing to do with the question whether this is a "boundary" dispute, or a "territorial" dispute, or whether the Court's task is confined to choosing between two lines or even whether the dispute is limited to the geographical region called the Aouzou strip.

All these are questions which the Court can decide as part of its judicial function. The fact that, on such questions, Libya takes a different view from Chad does not mean that the Court is required by Libya to exceed its proper judicial role.

Finally, I would make two observations on Chad's own position. The fact is that Chad has neither opposed Libya's case on jurisdictional grounds, nor on grounds of admissibility. It would therefore be wrong to accept arguments by Chad designed to place Chad in as good a position as if it had. If Chad had really believed Libya's claims were outside the jurisdiction conferred by the *Accord-Cadre*, or were for any reason inadmissible, Chad had ample opportunity to make those objections. But Chad did not do so. And it would be quite wrong to permit Chad to achieve the same result at the Merits stage by these extraordinary arguments that Libya's claims take the Court outside its proper, judicial role.

My second point is this. Chad's "third theory", developed at the Counter-Memorial stage, really makes nonsense of Chad's objections. As the Court will recall, that theory is that, even conceding that there is no conventional boundary, the so-called 1899-1919 line has become a conventional boundary by virtue of French *effectivités* — what Chad describes as occupation.

Clearly, such a theory is quite incompatible with the thesis that the Court is concerned only

with a "boundary" dispute, a choice between the 1899-1919 line and the 1935 line; or even that the dispute is geographically confined to the Aouzou strip. For any claim based on *effectivités* or occupation, is first and foremost a claim to *title*, and the title relates to the territory, not just to the line. The line is no more than the limit to which the title extends.

Now if that is so, it follows that the issue cannot be put in terms of a choice between the two lines, for Chad has to prove that France effectively and lawfully occupied the whole of the territory up to the line it claims. And for the same reason the dispute cannot be arbitrarily confined to the Aouzou strip. A French title to the Aouzou strip *must* assume French title to the borderlands to the south. Why should that be assumed? Where, in the *Accord-Cadre*, is there any basis for that assumption?

Mr. President, the answer must be that Chad cannot invoke assumptions of that nature. Chad has to show that France had a valid title to *all* the territory south of the line it now claims, in so far as the Ottoman Empire, Italy, and now Libya dispute that title. As to Libya's claims, let them be decided on their merits. That is the task of the Court, and there exists no reason to preclude this Court from this proper, judicial task.

The Court's task is, in Libya's submission, to draw a boundary line dividing the territory attributable to Chad from the territory attributable to Libya. Libya's submissions have been drafted to that end, not only because such a task falls squarely within the Court's competence as defined in the *Accord-Cadre*, but also because this is the only way to settle the present dispute with finality.

I have no doubt that the task is more demanding than simply choosing between two lines. But the task is perfectly possible and at a later stage in Libya's oral argument, when all the relevant considerations have been fully explained to the Court, I will return to suggest how, in Libya's view, these various considerations can be applied, and harmonized, so as to provide an actual boundary line.

Mr. President, that concludes my statement. I thank the Court for their attention.

The PRESIDENT: Thank you very much, Professor Bowett. We will resume on Monday morning at 10 o'clock to hear Professor Crawford.

The Court rose at 12.45 p.m.

CR 93/19

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Monday 21 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le lundi 21 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Olivier Corten, Assistant at the Faculty of Law of the Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susan Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

Mr. PRESIDENT: Please be seated. Mr. Maghur.

Mr. MAGHUR: Thank you, Mr. President.

Mr. President, Members of the Court, as explained on Friday, Libya now turns to a different phase of its case. This part of its case deals with the territorial dispute presented to the Court on the basis and assumption that no treaty in force establishes a boundary between Libya and Chad. The task Libya turns to now in its oral argument is to establish which territory within the borderlands appertains to each of the Parties.

It is my particular task today, to be shared with Professor Dolzer, who will speak tomorrow, to examine the basis of Libya's claim to title in the borderlands inherited from the Ottoman Empire and from the Senoussi peoples. This will involve examining the particular circumstances of this case to which the legal principles, which Professor Crawford will discuss later today, are to be applied. In setting about this task, I shall, first, describe some of the pertinent aspects of the geography of the region and, then, undertake a more detailed examination of the peoples living in the borderlands.

After that, I shall turn to the situation as it existed in 1890 when the Ottoman Empire challenged Great Britain's recognition of a French sphere of influence, running south from the Algerian coast as far as Lake Chad, as affecting regions over which the Ottoman Empire asserted sovereignty. The Ottoman challenge, it will be recalled, was accompanied by a detailed description of the extent of the Tripolitanian hinterland claimed by the Caliph in Istanbul. The respective merits of the Ottoman and French claims at the time will be examined.

Mr. President, the borderlands are in a part of North Africa whose place in the colonial history of Africa differed from the regions of Africa to the south. North Africa above 15° N latitude, essentially the part of Africa comprising the Sahara and the coastal regions north of this vast desert, has always had a Mediterranean orientation and connection. It was never colonized like the part of Africa lying to the south.

North Africa above 15° N latitude was the domain of the Ottoman Empire. It was not receptive to European Christian colonization. The tribes in the area were not only organized by they also had an organized religion — Islam. As Muslims, their allegiance was to the Caliph in Istanbul.

The Caliph was the sovereign ruler of the Islamic peoples and their lands. His rule was at one and the same time religious and temporal, there being no separation between the two in Islam. I will not go into the interesting history of the Caliphate following the death of the Prophet in 632 AD. The Caliphate had moved, successively, from Medina, to Damascus, to Baghdad and finally to Istanbul, where it was situated well before 1800. To the Turks, the Caliph was known as the Sultan. To other Powers, the Caliph was called the Porte — and often the Sublime Porte, meaning the "highest door". In North Africa, he was called the Caliph. All these titles reposed in the same person.

The Caliph in Istanbul was the head of the Ottoman Empire. It was not a centralized State; it functioned largely through delegation. This feature of Ottoman rule is important in our case. Chad assumes that because the Ottomans did not rule the borderlands with the full array of military, police, administrators, tax-collectors, courts and so on, the Ottoman Empire had no claim to sovereignty. This view of the matter is totally mistaken. The Ottoman rule was indirect, or delegated, because that was the Ottoman way of governing. But it is important to note, as well, that such indirect rule *was all that was needed at the time*. The people accepted the Caliph as their spiritual and temporal ruler. Ottoman rule in the borderlands was not an alien, hostile rule, and the Ottomans could indeed rely on substantial delegation.

As examples of Ottoman rule by way of delegation, the Porte sent *Walis* (that is, Governors) to Algeria, Tunis and Tripoli. He appointed a *Khedive* to Egypt (this was the Egyptian equivalent of *Wali*). And these Governors were delegated full authority to govern, subject only to the restrictions that they follow the Koran and the acts of the Prophet, that they consult with the learned men, and that they use their best judgement. The *Walis*, in turn, delegated authority to, for example, *Mudirs*, who were country administrators, and they, in turn, to district officers or *Kaimakams* — a word meaning, literally, "the man who sits in another's place". The *Walis* were given titles ranging from Pasha, the highest title, to *Bey* or *Dey*, to *Mutassarif*, the lowest.

The *Walis* of North Africa were Ottomans assigned to their posts from Istanbul. This included the first of the Karamanli sent to Tripoli, who held the high title of Pasha.

Mr. President, I should like to invite the Court now to take a broad look at certain regions of Africa and their inhabitants at the end of the 19th century.

I turn, *first*, to the physical geography of this part of Africa:

On the map on the screen appear the principal African rivers — the Senegal River, the Niger, the Congo and its tributaries, Lake Chad and the Chari River, the Nile (White and Blue Nile). The regions of these rivers and of Lake Chad were the *main target* of European colonization. The rivers provided access to the interior; and the lands fed by them were fertile and populated. The colonization of these regions came from the west and the south, not from the Mediterranean to the north.

To the north extend the vast desert regions of the Sahara, including the Libyan Desert, roughly north of 15° N latitude (folder No. 79). In this hostile environment, only scattered settlements of essentially nomadic tribes existed. These were Muslim tribes, who had come to accept the authority and leadership of the Senoussi. The Caliph considered these regions and the people living there to be the domain of the Ottoman Empire, and *allegiance* to the Caliph was expressly recognized by the Senoussi and by the peoples whom they led.

Continuing the description of the physical geography, it will be noted that the mountainous regions of Tibesti and Ennedi lie in the borderlands. The topography of the borderlands emerges with particular clarity on the landform map now on the screen, bringing out the harshness of the environment. The line that happens to appear on this map published in 1952 is the 1935 Treaty line.

Mr. President, turning from the physical geography, the map shows the major trade routes and key oases which you can also find as No. 80 in your folders. In a desert region such as the borderlands, the trade routes and oases were essential for the economic life of these regions and the peoples living there. It was along the trade routes that the Senoussi Order established its lodges, which were called *zawiyas*. I will describe the Senoussi Order and the functions of the *zawiyas* in a few moments.

I turn next to the general location of the principal tribes inhabiting the borderlands and the surrounding regions:

In 1890, the borderlands were inhabited by organized Muslim tribes, paying allegiance to the Caliph in Istanbul. In large part, the tribes of the borderlands were nomadic, scattered among the principal oases of the desert and the harsh mountainous regions of Tibesti and Ennedi. Some were distinctively Arab tribes — the Awlad Sulaiman, the Gadhadfa and the Orfella — who had come south from Cyrenaica and Fezzan. There was a constant interchange between them and their fellow tribesmen remaining in the north. The German explorer Nachtigal, who travelled through much of the borderlands in the 1960s and 1870s, recorded that the Awlad Sulaiman were at the time in firm control of much of the region of Kanem.

The general location in the region of these three tribes is shown on the screen, together with the two main Libyan tribes in the Koufra oases, the Magharba and the Zuwaya. A sizeable number of Libyan traders in the main centres of the borderlands largely controlled economic life. What is shown on the screen is necessarily approximate given the living habits of the predominantly nomadic tribes.

Two other tribes, with an ancient history in the region, were the Tuareg and the Toubou. In the regions shared by Libya and Algeria, the Tuareg, who were organized as a confederation of tribes, were the dominant tribe. Tibesti was the domain of the Toubou — or, more precisely, the branch of this tribe known as the Teda Toubou. Although there has been much scholarly discussion about the origin of the Toubou, it is well established that for a considerable period of time in the distant past they had dominated much of southern Fezzan and Cyrenaica. It was only natural, therefore, that after the Toubou established themselves in Tibesti their principal ties remained to the north.

As the map shows, the regions inhabited by these various tribes overlapped. All of these tribes had strong ties to the north either because of their Libyan Arab origin or because of historical, social and commercial links to Libya — and above all because they came to be Senoussi tribes, having willingly accepted Senoussi leadership and doctrine. In 1952, after the independence of Libya, the sheikh of the Awlad Sulaiman was named *Wali* or governor of Fezzan in newly independent Libya.

This then was the territory into which the French military forces fought their way, arriving at Lake Chad in the period 1899-1900.

It would not be possible to consider any of the regions of the borderlands lying north of the Sudanic Sultanates as *terra nullius* at that time. For these were lands, to quote in part from paragraphs 80 and 81 of the *Western Sahara* case, "inhabited by tribes or peoples having a social and political organization . . . under chiefs competent to represent them" (*I.C.J. Reports 1975*, p. 39, paras. 80-81).

What I want to point out is that tribes like the Awlad Sulaiman, the Gadhadfa and the Orfella were ruled and represented by Libyan *sheikhs*.

The Toubou in Tibesti were led by a *Derde*. The Tuareg were a confederation of tribes, led by their sheikhs. If these tribes were considered by European visitors to the region to be hostile and unruly, compared to more sedentary peoples, it was because they wished to be left alone and they resented foreign intruders. The harsh conditions of the Sahara Desert and the mountainous regions such as Tibesti tended to make the inhabitants there difficult to get on with — almost, it would seem, reflecting the harsh conditions of their environment. This was, and still is, a rather common characteristic of nomadic desert peoples.

Mr. President, the French military forces recognized the leadership of these peoples and tribes and their social and political organization at the time. In 1862, the Prince de Polignac entered into formal commercial arrangements on behalf of France with the Ajjer Tuareg tribes. Repeated attempts were made by the French to enter into agreements with different *Derde* of the Toubou of Tibesti. But when French forces entered into the borderlands starting in 1913, the *Derde* of the Toubou, rather than submit to the French, fled to the north where many of his tribesmen lived in southern Tripolitania and Cyrenaica.

It had been the French tactic in fighting their way toward Lake Chad to enter into agreements with local chiefs. This was particularly the case in the Sudanic Sultanates, although even there the French confronted obstacles. The major obstacle was Rabbah. However, the combined French forces succeeded in defeating him in 1900, opening the way to further agreements with the local

chiefs. Further to the east, the Sultan of Ouadaï put up a ferocious fight, but in the end his forces were defeated; and the Sultan was deposed by the French and replaced by a more docile Sultan of their choosing.

Mr. President, Libya took pains to describe — and to support with evidence — these facts in its Memorial. I particularly commend to the attention of the Court Part IV of Libya's Memorial, and Volume 2 of its Reply, Supplementary Annexes 7 through 11.

As Professor Crawford will explain, the fact that the borderlands were not *terra nullius* has a dual significance in this case. First, it meant that title to the region could not be acquired by occupation. Second, it meant that the peoples of the borderlands had the legal capacity to hold title over their lands.

This brings me to the entry of the Senoussi on to the scene. I have deliberately taken up the question of *terra nullius* based on the *pre-Senoussi* situation in the borderlands. For I wanted to demonstrate that the region was not *terra nullius* before the advent of the Senoussi. But if this question were in doubt — which I frankly cannot conceive of — then any such doubt is certainly banished by the assertion of Senoussi leadership and authority over the peoples of the borderlands. This was an event that preceded the arrival of the French three-pronged advance on Lake Chad. And the Senoussi had been firmly in control of the borderlands some 13 years *before* French forces were authorized by the French Government to advance into the borderlands in 1913.

Starting in the latter part of the nineteenth century, this powerful new force, the Senoussi Order or Brotherhood, entered the scene. By the end of the century, the Senoussi had established their *zawiyas*, or lodges, throughout the area as the Judges can also see from Map 19 in their folders.

Both the Senoussi Order and the *zawiyas* they established have been fully described in Libya's written pleadings and in the evidence annexed to them so I need only summarize the situation here (ML, starting at para. 1.22, para. 3.44, para. 4.78, para. 4.151 and para. 5.221; CML, starting at para. 5.11 and paras. 8.64-8.67; RL, starting at para. 7.46 and paras. 9.16 and 10.06. See also LR, Vol. 2, Supp. Ann. No. 3, the note on the "Role of the Senoussi in the Central Sahara"; and LR, Vol. 3, Anns. 13 and 14).

Libya has preferred to simplify somewhat the terminology used. The term "Senoussi" refers to the Senoussi Brotherhood or Order; but the word is also used as an adjective, as in the expressions "Senoussi tribes" or "Senoussi peoples". The Senoussi themselves were not a tribe. The term "Senoussi tribes" refers to the tribes of the region who embraced the Senoussi doctrine. For the Senoussi carried out their mission, both religious and civil, through the organized tribes.

It is important to point out that, without exception, the tribes of the borderlands were Muslims embracing the Senoussi doctrine and paying allegiance to the Caliph in Istanbul. Thus, the tribes I mentioned earlier, the Awlad Sulaiman, Qadhadfa and Orfella — the Arab tribes who came south from Cyrenaica and Fezzan — were all Senoussi tribes who accepted the Senoussi doctrine and Senoussi leadership and authority. The same is true of the Tuareg and the Toubou, particularly the latter, who became the staunchest of Senoussi followers. This is confirmed, for example, by a 1911 French military despatch, cited at paragraph 5.71 of Chad's Counter-Memorial, in which it is reported that the Toubou received their orders from the Senoussi whom they blindly obeyed.

Just as Tibesti, the land of the Toubou, was firmly controlled by the Senoussi when the French arrived at Lake Chad in 1900, so also was the region of Borkou to the south. Chad concedes this in its Memorial; and again in its Counter-Memorial at paragraph 5.69, where it is said that "in reality the real power ("le pouvoir effectif") was exercised in the region by the Senoussi". Mr. President, there is no question, therefore, about the fact that the Senoussi were the controlling force in the borderlands in 1900 when French military forces arrived at Lake Chad. The peoples of the region were members of Senoussi tribes who had accepted the leadership and authority of the Senoussi Order. In 1899, the Senoussi Order moved its centre south from Koufra in Cyrenaica to Gouro, just east of the Tibesti massif, in order to be in closer touch with events resulting from the mounting French military threat.

The Senoussi had just performed the remarkable task of bringing together the Tuareg and Awlad Sulaiman tribes — who up until then had been warring against each other. They established in Kanem the Bir Alali *zawiya* and proceeded to harness the fighting forces of these two tribes to repel the French attack.

Certain parts of Chad's Counter-Memorial reveal an attempt to retreat from Chad's initial, accurate assessment of the role of the Senoussi set out in Chad's Memorial. Chad attempts to portray the Senoussi as having had a purely religious influence in the region. Chad's Counter-Memorial suggests that the Senoussi Order was not even Libyan since the Grand Senoussi, who founded the Order, was born in Algeria. This is hardly a serious argument. Was Napoleon any less French because he was born of parents named Carlo and Letizia Buonaparte on an island that only the year before had been ceded to France? In any event, in the early 1800s, questions of nationality and boundaries had little meaning in the Muslim regions of North Africa. What mattered was the common sharing of Islamic beliefs and loyalty to the Caliph.

To set the record straight, Mr. President, let me explain a few of the essential facts concerning the Senoussi. These are historical facts which are not altered by the more recent political history of the Senoussi in Libya. In this regard, I have to mention that just after these oral proceedings began, an article appeared in *Le Monde*, on 15 June, quoting Chad's Deputy-Agent concerning Libya's reliance on its Senoussi inheritance. I have no doubt that Professor Pellet was misquoted. No one has forgotten that the present régime in Libya deposed the late Senoussi King of Libya in 1969. But that does not mean that the Senoussi have ceased to be a part of Libya's history. Libya's greatest hero is the legendary Omar Mikhtar, who led the fight of the Libyan peoples against the Italians. He was a leading Senoussi sheikh.

Mr. President, the founder of the Senoussi Order or Brotherhood, known as the Grand Senoussi, was born in Algeria around 1787 of a prominent Sharifian family. The word "Sharifian" refers to any dynasty related to the Prophet.

He studied in Fez until his early thirties, when he left to make the pilgrimage to Mecca. It was there that the Grand Senoussi met the future Sultan of Ouadaï, who became a loyal follower. In later years, the Senoussi Order even established a *zawiya* at Abéché, the capital of Ouadaï.

The Grand Senoussi founded the first *zawiya* in northern Cyrenaica near the Mediterranean coast in 1843, which became the center of the Order. In 1856, the Grand Senoussi moved the Order's centre south to an obscure oasis, Jaraboub, which was selected because of its location on the

east/west pilgrimage route across North Africa and Egypt to Mecca. Jaraboub was transformed into a great centre of learning with a university and a huge library embracing a wide range of subjects including religion, law, philosophy, history, astronomy and poetry. To quote the British historian Evans-Pritchard:

> "it would have been difficult to have found anywhere in the Islamic world at the time, outside Cairo, a circle of better scholars".

The Grand Senoussi's son by his second wife, a Libyan woman, took over as Head of the Senoussi Order at the death of the Grand Senoussi. He is known as the Great Senoussi. He was devout like his father but also, to use the words of Evans-Pritchard, was said to be "an eloquent and inspiring leader and . . . an able organizer". His followers revered him, and he was called the "Mahdi" — or what might be described as the second coming of the Prophet.

In 1895, the Order's centre was moved south to Koufra, on the eastern caravan route from Benghazi to Ouadai. From there the Order intensified its activities in the borderlands and in regions further south and west, where *zawiyas* were established at oases along the caravan routes. In the light of the French military advance, in 1899, the Order's centre was again shifted southward to Gouro, just east of the Tibesti massif, where the Senoussi could better organize and control the tribes of the borderlands to meet the French military threat.

The Senoussi movement southward followed the eastern trade routes from Benhazi and the western trade routes from Tripoli. This can be seen on the map on the screen. Starting from the first Senoussi *zawiya* established by the Grand Senoussi at al-Baida in Cyrenaica in 1843, the Senoussi Order moved southward along the eastern trade routes, establishing *zawiyas* at various key locations. In the borderlands, major *zawiyas* were established at Ounianga Kebir and Ounianga Seghir in 1871-1872, in Ennedi in the 1880s and southward into Ouadai, where a *zawiya* was established at Abéché. The Order's Headquarters was moved south to Djaraboub in 1856 and then to Koufra in 1895. The Great Senoussi supervised the digging of the Sarra Wells in 1898.

One of the major *zawiyas* in the borderlands was established to the south of Tibesti at Aïn Galakka, in the region of Borkou. Shortly before that, in 1896, the major Senoussi *zawiya* at Bir Alali had been established, just east of Lake Chad. The French destroyed this *zawiya* in 1902. Like

the *zawiya* at Aïn Galakka — but unlike *zawiyas* elsewhere where there was no threat from French forces — the Bir Alali *zawiya* had been heavily fortified.

As Senoussi control progressed southwards — and with the conversion of the powerful Zuwaya and Magharba tribes in the region of Koufra into ardent Senoussi followers — the great eastern trade routes to the Sultanate of Ouadaï flourished. As I mentioned earlier, the Sultan of Ouadaï himself was a loyal Senoussi follower.

On the west, Senoussi *zawiyas* were also established early at the major oases on the well-established trade routes from Tripoli to the south: Migda (1845), Mourzouk (1850), and so forth, as shown on the map.

With the encouragement of the Derde, the leader of the Toubou in Tibesti, a *zawiya* was established in Bardaï, the most strategically situated oasis in Tibesti, and the Toubou became and remained the most loyal of Senoussi tribes.

This, then, was the situation that prevailed around the turn of the century, with the Senoussi in control of extensive areas of North Africa, including the borderlands regions.

The Senoussi *zawiyas* were the principal instrumentality through which the Senoussi Order exercised its functions. Primarily, the *zawiyas* were religious and educational centres, but they had a commercial function, as well, and served as hostels to the travellers along the trade routes. When the French started to invade the borderlands, the more strategically located *zawiyas* also as armed fortresses.

The Court will now see on the screen an artist's rendition of a *zawiya*, modelled after the one at Aïn Galakka in Borkou. I should like to explain the purpose and operation of a *zawiya* in order to show the functions performed by the Senoussi and how they exercised their leadership over the peoples of the borderlands.

I shall begin with a sketch of the City of Medina, the first city built by the Prophet, for a *zawiya* was based on the Muslim concept of a city built around a mosque, of which Medina was the prototype. The central point brought out by this sketch concerns location. Just like Medina and other Muslim centres, *zawiyas* were typically located at key oases along caravan routes — at places

where people gathered, where was communication with other oases and where trade flourished.

Allow me, Mr. President, to pause here a minute. Medina was built by the Prophet when he was forced to emigrate from Mecca to Medina — an event known as the *Hejirah*. The first day of the *Hejirah* marks the start of the Islamic calendar, and each year it is the beginning of the Islamic New Year. That day, Mr. President, happens to be today; and I take this opportunity to join my fellow Muslims all over the world in their congratulations. Thank you, Mr. President.

The next sketch, taken from the official French Military History of the A.E.F., shows the Ain Galakka *zawiya* and its surrounding wells and farm lands.

Now, in the next sketch, we see a drawing of the layout of this *zawiya*. This illustrates the several functions that were performed by the *zawiya*. The *zawiya* might be compared to a European walled city of medieval times or to Christian monasteries that in case of need were fortified and armed. Normally, the *zawiya* was not fortified. It was the French military advance that had caused this feature to be added, just as organizing the tribes against the French invasion was a function added to those ordinarily performed by the Senoussi.

The heart of the *zawiya* was the mosque, shown here on the right side of the sketch. The word *zawiya* means "corner" in Arabic. Here in the mosque, in the domed area called el-Kuba, was the Sheikh's "corner", the place where he prayed, facing Mecca. The mosque had both open and enclosed spaces. It was to the mosque that the young came to study under the Sheikh's supervision. His own family living quarters were across on the other side of the *zawiya*. In normal times, aside from the Shikh's family, other notables occupied this section. The other residents of the oases lived in the areas surrounding the *zawiya*, where the camels and horses were tended and crops were grown.

What we see here is an outline of all the *zawiya*'s functions:

— Religious

— Educational

— Trade

— Providing shelter to travellers

— The administrative functions of the Sheikh, which included settling disputes and raising

revenue

— Communication

— Protection against the invading forces of the French.

When the *zawiya* was threatened, things changed rapidly. The tall, thick walls around the *zawiya* allowed it to become a military bastion into which the people came to live. It then became a walled town.

Mr. President, the functions performed by the Senoussi reflected the obligations of government under Islamic doctrine, which were:

— To defend the faith;

— To develop the land — which in practical terms in the regions of North Africa in question meant maintaining and protecting the caravan routes and developing and protecting the sources of water;

— To safeguard the subjects of the State, whether Muslim or not;

— To recruit an army;

— To raise funds to support the State;

— To fulfil the laws governing the relations of citizens, including the rendering of justice and mediating disputes; and

— To teach the Islamic religion.

The Senoussi performed all of these functions in the borderlands as well as elsewhere in Libya. The rallied the warring tribes, which they brought together, to defend Islam against the invading French, in the south, and against the Italians, in the north. The Great Senoussi oversaw the digging of the Sarra Walls south of Koufra in 1898, and it was the Senoussi who caused the eastern trade routes to flourish. Their efforts were clearly devoted to safeguarding the subjects of the State. They raised funds in support of these efforts. They mediated disputes, bringing together the warring tribes. In their *zawiyas*, they worshipped God, taught the Koran and provided education to the peoples. But the most important thing is that the Senoussi performed these functions *in the name of, and under the mantel of*, the ultimate Ottoman sovereignty.

Mr. President, this then is a brief description of the Senoussi Order and of the *zawiyas* that the Senoussi established throughout the zones they controlled. The sheikhs were normally Libyans appointed by the Head of the Order. The key followers, or *ikhwan*, meaning "brothers", were also Libyans. But the Senoussi's functions were carried out within the tribal framework of the major tribes. The Senoussi did not attempt to replace the tribal leadership with its own. The tribal leaders of the borderlands welcomed and accepted the authority of the Senoussi.

In the period before the arrival of the Senoussi, the constant fighting among the tribes of Fezzan, Cyrenaica and the borderlands had seriously interfered with the flow of commerce along the trade routes. The Senoussi succeeded by the end of the 1890s in bringing the tribes together, and once again the trade routes from Tripoli to the Sudan were made secure. In the east, the two great tribes of the Koufra oases embraced the Senoussi doctrine and leadership, permitting the eastern trade routes from Benghazi to Ouadi to flourish. At the time of Senoussi control it was said that a woman could travel alone from Cyrenaica to Ouadaï without being harmed. Similar claims were made as to the safety of the western trade routes south from Tripoli to the Sultanate of Bornou.

Mr. President, the arrival of the Senoussi in the region, and the acceptance of their authority by the peoples, were not well understood at the time by the European explorers of the region or in the European Chanceries. For as I said earlier, in Islam there is no artificial division between the religious and the temporal sides of life. They are the two sides of the Prophet. The Caliph in Istanbul was the religious leader of the Islamic peoples, who paid allegiance to him; and he was their temporal ruler at one and the same time and exercised sovereignty over them and the lands they inhabited. Similarly, the Senoussi Order had both a religious and a temporal function.

But though the Senoussi were openly critical of the standards of Islamic practice maintained by the Caliph in Istanbul, the sovereignty of the Caliph, the Sultan of the Ottoman Empire, was fully recognized. The Senoussi peoples of the borderlands were regarded, and regarded themselves, as *subjects* of the Ottoman Empire. The lands they inhabited were considered to be under Ottoman sovereignty. The Senoussi reinforced this relationship, bringing to the peoples both religious instruction and education and a new level of social and political organization. They settled the

differences between the tribes and opened up the trade routes so that commerce could flourish. Later, they harnessed the military strength of the different tribes in the face of the French invasion. It is totally incorrect to describe the Senoussi as having had only a religious influence in the area, as Chad's Counter-Memorial does.

Mr. President, in fact, so great was the Senoussi power and influence that it initially caused apprehension in Istanbul. But as the Caliph came to know and understand the Senoussi, he realized that benefits would accrue from building a closer relationship. As the threat of the French and, later, the Italian invasion materialized, this relationship became increasingly important. Examples of this may be found in Libya's Reply:

— A report from Benghazi to the Grand Vizier in Istanbul of 5 August 1884 (LR, Exhibit 8.2);

— Despatches of 1886 and 1888 (LR, Exhibits 8.3.1 and 8.3.2);

— An Ottoman Council of State document (LR, Exhibit 8.1);

— An 1891 report of the Ottoman Imperial (LR, Exhibit 8.5.1). This report contains this statement:

> "It is of the utmost importance that (the Head of the Senoussi), whose word is extremely influential among the nomads and the tribes, lend his support to this enterprise in furtherance of this aim it is necessary that the Sublime Porte and the Palace be advised to intercede with him (Head of the Senoussi) in the required manner."

I could go on to read many more documents in this vein, but the essential point has been made. This evidence is summarized in Libya's Reply (Vol. 2, Supp. Ann. No. 8, and set out in the related Exhibits in Volume 3).

Mr. President, that the Senoussi Order fully recognized Ottoman sovereignty was made very clear in 1911 in the letter addressed by the Head of the Senoussi to the major European Powers — two years prior to the French military invasion of the borderlands. Let me read some passages from this letter, which appears as Exhibit 47 to Libya's Memorial:

It begins with this statement:

> "As everyone is aware, the French are engaged in a crusade against the Orient in general and Islam in particular under the pretext of spreading civilization."

Then it goes on to refer to the Anglo-French Declaration of 1899, saying that:

> "France illegally took part of the Turkish possessions to the north of Lake Chad

and certain lands forming part of the vilayet of Tripolitania".

The Head of the Senoussi follows with this declaration of allegiance:

> "It is also well known that the Senoussi congregation has since its foundation been held in universal esteem for the works of its chiefs, who have spread true civilization and true knowledge, reforming the Muslim religion and above all spreading the teachings of the Koran 'nowhere in the sentence' *without ever ceasing to counsel the people to obey the Sublime Porte, for which it prayed day and night, placing itself under the protection of its flag and acknowledging its dominion.* "

The letter then turns to discuss the French military mission, pointing out that:

> "France . . . when it began to penetrate in this region found the contrary to what it had expected, namely that those inhabitants whom it believed to be savages were, instead, instructed and enjoying the advantages of Islamic civilisation."

The letter ends with the following statements:

> "We explained these facts to the Sublime Porte, bringing to its attention the violations that France was undertaking on Ottoman territory, killing its subjects, with the excuse of spreading civilization to the centre of Africa and we trust that it will protest.
>
> We are now publishing these facts in the newspapers to bring to the knowledge of the civilized world the method that France is using in central Africa against quiet and peaceful people, so that the just Powers of Europe may assist the Ottoman Government in preventing the grave injustice of the invasion of our country."

I should now like to turn to an evaluation of the situation at the turn of the Century when the French entered the scene and began to transgress into areas over which the Caliph had claimed sovereignty. What was the nature of each of these conflicting claims, and who had the better claim to title? This conflict in 1890 was really the beginning of the territorial dispute in this case. The initial Ottoman protest and assertion of rights was only the first of several even more detailed notes verbales and memoranda from the Caliph in which the basis of Ottoman rights was carefully stated in both legal and factual terms.

The recognition by Great Britain of a French sphere of influence south of Lake Chad was completely different in character from the Ottoman assertion of sovereignty over the hinterland of Tripolitania. Once again, I must note that these differences have been detailed in Part IV of Libya's Memorial, but let me highlight some of them:

First, on the legal plane, the Ottoman Empire had made a claim to an existing sovereignty. It was a claim to territory appurtenant to sovereign territory, namely Tripolitania, to which the

Ottoman Empire claimed a hinterland. The French sphere of influence recognized by Great Britain in 1890 was nothing of the kind; there was no French assertion of sovereignty involved. The Ottoman assertion of a Tripolitanian hinterland made clear the *animus occupanid* of the Ottoman Empire, one of the essential elements of territorial sovereignty. The French sphere of influence, on the other hand, was no more in 1890 than an agreement of mutual restraint between the British and the French. The French never did have any *animus occupandi* concerning the borderlands, certainly not prior to 1919 or, indeed, prior to 1930. When the French advanced into the borderlands in 1913, it was to *destroy* the Senoussi *not* to occupy the territory.

A second major difference between the French sphere of influence and the Tripolitanian hinterland claimed by the Caliph was that the Ottoman claim was not a claim based only on geography or contiguity — it was based as well on social organization.

It was not a question for the Ottomans, as it was for the French and the British, of drawing lines on maps where no white man's foot had ever trod, as Lord Salisbury out it in his often quoted remark. The lands over which the Ottoman Empire claimed sovereignty in 1890 were inhabited by Muslim peoples who ultimate allegiance was to a common ruler and authority on both religious and temporal matters, the Caliph in Istanbul. The Caliph sent emissaries with gifts into these regions, gifts that signified the relationship between ruler and ruled in the Muslim world. These emissaries reported back to him in Istanbul, informing him of developments in the regions and its peoples. I refer in particular to the 1888 and 1894 reports of Colonel Subhi and Muhammad Basala (See, ML, starting at para. 4.122).

Even closer and more frequent contacts with the peoples in the borderlands were maintained by the Wali of Tripoli, who acted under powers delegated to him by the Caliph. In replying to the Ottoman note of 1890, the French Government displayed its ignorance of the functioning of the Ottoman Empire based on the principle of delegation. The French Government attempted to discount the Ottoman 1890 claim on the grounds that it was not the Caliph but the Wali of Tripoli who maintained frequent contacts with the peoples of the Tripolitanian hinterland. But the French overlooked the fact that the Wali was acting in the name of the Caliph.

Critical to this relationship were the north/south caravan routes that have been described earlier. As the map on the screen shows, the Ottoman hinterland claim embraced the trade routes that had for centuries been essential to the economic and social life of the Mediterranean coastal regions of Tripolitania. The Wali of Tripoli controlled the western caravan routes as well as entry into the interior. A French mission headed by Colonel Flatters, which headed south from Algiers overlooking the requirement of obtaining an Ottoman *laissez-passer*, was decimated in 1881, putting a halt to French penetration southward from Algiers for many years (ML, para. 4.123).

As events developed, the growing French-Ottoman conflict widened beyond a territorial dispute. It became a struggle over control of the western caravan routes, and it was then that the Italian Government's concern sharpened. For Italy had a growing commercial and financial stake in Tripolitania, quite aside from future expectations to inherit one day this part of the Ottoman Empire. The French started to attempt to diver trade from Tripoli to Tunis and Algiers. This was a direct threat to the reliance of the Ottoman Empire and the vilayet of Tripoli on the trade routes running north/south from Tripoli through the Tripolitanian hinterland. In fact, it was regarded as essential to the welfare of Tripolitania and its peoples that these caravan routes not be diverted to the west by the French.

It is evident that, at the turn of the Century, the Ottoman claim to a Tripolitanian hinterland was a claim to title over regions and the peoples living there that had real substance. At this time, the French had made no claim to title at all to regions south of Tripolitania. France had no knowledge of this region and no contact with its peoples. For the French, as for any other European, to even enter the region, an Ottoman *laissez-passer* was required.

Mr. President, instead of attempting any serious discussion of the merits of the Ottoman claim, the French Government loudly objected to what it said was the exaggerated extent of that claim. Earlier in Libya's oral argument, the inconsistency of France's position was discussed and illustrated. In 1894, the French Government had officially recognized the Ottoman Empire's Egyptian hinterland down almost to the Equator. In 1890, an Algerian sphere of influence covering territory almost as extensive as the Tripolitanian hinterland claimed by the Caliph, was recognized in

the 1890 Anglo-French Declaration. Meanwhile, Mr. President, the integrity of the Ottoman Empire had been guaranteed by Great Britain and France in several treaties and this was again noted in the General Act of Berlin of 1885.

The French expansion north of Lake Chad was a blatant attempt to evade that guarantee. Similarly, France's reliance on an alleged treaty-title to the borderlands was a sham. France had acquired no such title. Title remained where it had long rested: with the Senoussi peoples and the Ottoman Empire, who were present in and administratered the territory in question.

The ends of my part of the story, Mr. President, and i would be grateful if you would call on Professor Crawford. I thank you very much.

Mr. PRESIDENT: Thank you very much, Mr. Maghur. Professor Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court.

A. Introduction

1. As Mr. Mughur has pointed out this part of the Libyan case deals with the territorial dispute on the assumption that there is no treaty in force establishing the boundary. Within that framework, my function is to step back from the complex of events and to analyse in a little more detail the applicable law. This will involve two distinct stages.

2. The first stage requires an analysis of the law applicable to the determination of title in a region such as the borderlands in the period before 1919. That was, of course, the period at which the traditional law of territorial title and acquisition held sway. The second stage requires an analysis of the developing modern law. After 1919 new elements come into the picture, especially the prohibition of conquest as a means of acquiring territory. These new elements overlay, supplement, and in some respects supplant the old law. As will be seen, the distinction between the two stages in the development of the law is of considerable significance to this case.

B. The Pre-1919 Law of Territorial Title

3. I turn then, Mr. President, Members of the Court, to the question of the applicable law in relation to disputed title in the period before 1919. In relation to this period the Libyan case is based

on the following four propositions:

* Proposition 1: The borderlands, the disputed area in this case, were not *terra nullius* at any relevant time.

* Proposition 2: The Anglo-French agreements of 1899 and 1919 did not affect the legal status of the territory;

* Proposition 3: In 1912 sovereignty was vested in the tribes, under the organization and influence of the Senoussi Brotherhood, and in conjunction with the Ottoman Empire which represented the territory and its people on the international plane.

* Proposition 4: That sovereignty was acquired by Italy under the Treaty of Ouchy, the Italian inheritance being recognized by other States, including France.

4. To some extent the legal rules which are relevant to these four propositions are not in dispute, and to that extent, I can be brief. But there are important disagreements between the parties on the legal position, and these require some elaboration.

5. The underlying reason for the disagreements is that Chad relies on an extreme pro-colonial view of international law. This was the view that required, for the existence of legal status or rights, some express act of admission by the international community, a community identified with the States of Europe. The Ottoman Empire itself was supposedly so "admitted" in 1856. This was the view that made international legal personality conditional on the existence of a civilization assimilated to European or (as one English writer described it) "white" civilization. This was the view that saw in native peoples occupying their own land mere objects of international law and obstacles to colonization. It was that view that underlay the French attitude at the time, as Partsch points out in his account of the Fashoda incident in the *Encyclopedia of Public International Law* (Vol. 7, p. 86-7). Perhaps in more subtle ways, it underlies the Chad position now.

6. That view was, of course, decisively rejected by the Court in the *Western Sahara* case. It must be stressed that the Court in that case was not merely saying that the new law of the Charter and of self_determination should govern, rather than the old law of territorial aggrandisement. Of course the issue which underlay the advisory opinion was the question of self-determination for the

Western Sahara. The Court was asked two questions about the legal position in the 1880s, but as it pointed out, the reason why it was asked those questions was the possibility that the answer might affect the self-determination of the territory. So the Court was asked, in effect, whether before 1884 there were legal ties between the Western Sahara on the one hand, and Morocco and the Mauritanian entity on the other hand, which were "of such a nature as might affect the . . . decolonization of the Western Sahara" (*I.C.J. Reports 1975*, p. 12 at p. 68, para. 162. The Court gave a negative answer to that question, but it necessarily did so by focusing on the legal position in the period before Spanish colonization. In other words, the Court was dealing with the situation and status of the peoples concerned in the 1880s. And in doing so it was applying, not superseding, the principle of the intertemporal law. Its decision is accordingly central to an assessment of the competing claims of the Ottoman Empire and of France in the period before the First World War.

7. It is remarkable then that nowhere in Chad's pleadings is the case carefully analysed. Indeed in the whole of its pleadings Chad cites no more than a few sentences from the decision. Moreover in the treatment Chad does choose to give, the decision is diminished, treated as inapplicable and finally ignored. In truth the decision is doubly relevant to the present case. It is relevant because it lays down authoritatively the criterion for *terra nullius* and the corresponding legal concept of occupation. And it is relevant because it deals with the assessment of claims to sovereignty over territory which, though not *terra nullius*, was arid and sparsely inhabited.

8. Against this general background I now turn to three basic legal issues which divide the Parties as to the applicable law in the period before 1919. These are:

(1) the test for determining the legal status of the borderlands before 1919, and in particular whether they were or become *terra nullius*;

(2) the status of so-called spheres of influence agreements; and

(3) the test for establishing sovereignty over territory which is not *terra nullius* but which is arid and sparsely inhabited.

Each of these issues has of course been discussed in Libya's pleadings, and what I have to say about them is to be taken in conjunction with that discussion (see especially LR, para. 7.01-7.68).

(1) The Terra Nullius Test and the Tribes of the Borderlands

9. On the first issue, the *terra nullius* test, Chad is strangely reticent. In its Memorial it merely states that effective occupation "is the basis of sovereignty over territories which have no inherent social or political organization" (MC, Chap. II, para. 12): it goes on to cite the *Western Sahara* opinion, one of the few times it does so in the Memorial. Since Chad consistently refers to France as having " occupied" the territory, the statement I have quoted suggests that Chad might regard the borderlands as *terra nullius*. But, although it expresses dark doubts as to whether the tribes had a social or political organization (CMC, para. 5.177), Chad never says in so many words what it thinks the position was. In itself that is remarkable, because it is necessary to determine that question before one can determine which of the various modes of acquisition of territory — occupation, cession or (to the extent that they are recognized by international law) conquest or even prescription, might be relevant.

10. One reason for Chad's reticence is a conflict within its pleadings on this point. In one place in its Memorial (MC, Chap. V, para. 1.77) it states unequivocally that during the years 1899-1902 and again until 1912 "it was the Senoussi who exercised sovereign rights then the territory was not *terra nullius*, and equally obviously, it was not open to occupation. But this passage is disavowed in Chad's Counter-Memorial (CMC, para. 1.31). There Chad states that the position is "plus nuancée". In its context the term "nuancée" can only mean that Chad's position is reversed. Now Chad, castigating Libya for an argument which it itself had advanced in its earlier pleading, argues that the notion of sovereignty was inapplicable at all times before French "occupation" of the territory (CMC, para. 1.33; see also *idem*, para. 5.15).

Mr. President, Members of the Court, there may have been a decline in Senoussi power during the first half of this century, but it was as nothing compared with the decline that seems to have occurred between 1991 and 1992, the dates of the Chad Memorial and Counter-Memorial. From a sovereign entity the Senoussi have become merely an incompetent and febrile religious sect!

11. It must be admitted that the symptoms of that decline can be seen even in Chad's Memorial, despite its apparent acceptance of the sovereign rights of the people of the borderlands.

Thus Chad states that at the turn of the century the borderlands were "soumis à l'autorité, directe ou indirecte, de la Senoussia qui, contrairement à la Sublime Porte, n'avait pas été 'admise au bénéficier du droit public de l'Europe'" (MC, Chap. IV, para. 130). Similarly it says this of the Ottoman Empire: "reconnue comme un Etat à part entière, elle avait vocation à bénéficier des mêmes 'droits' que les autres Etats européens au regard du droit international prévalent alors" (MC, Chap. IV, para. 131). It was for this reason, according to Chad, that the 1899 Declaration was *not* opposable to the Ottoman Empire (*ibid.*). It had been recognized, it had been admitted. By inference, the 1899 Declaration *was* opposable to the Senoussi and the tribes who had no such benefit.

12. But the point is taken much further in Chad's Counter-Memorial. In addition to retracting the earlier concession about the sovereign rights of the local people under the Senoussi, the Counter-Memorial equates the absence of *terra nullius* with a "Libyan" thesis full of "contradictions et apories" (CMC, para. 5.01-4). According to Chad, the *Western Sahara Opinion* is not applicable "en dehors du contexte spécifique sur lequel la Cour a statué dans son avis" (CMC, para. 5.13), although it does not say what this specific context was. After all, both this case and that case concerned the status nomad Saharan tribes in the last decades of the nineteenth century. Indeed the Court expressly said that it was dealing with the *same* desert (*I.C.J. Reports 1975*, p. 12 at p. 4, para. 87).

13. No doubt there are some differences between the two cases. In particular, the *Western Sahara* case concerned the fate of an entire self-determination territory, a territory under Chapter XI of the Chapter, whereas the present case concerns the attribution of disputed territory between tow independent States. But in so far as the Court was dealing with the *terra nullius* point and the existence of judicial links with Morocco or with the Mauritanian entity in the 1880s, its decision is directly relevant here. Perhaps Chad is suggesting that customary international law was different in the Eastern Sahara and in the Western Sahara? But they key point the Court was making in that case was that international law is not relative or regional but universal, that its rules and standards are not determined by any one culture or religion, however influential, and that international law is flexible enough to accommodate different geographical, political and social circumstances. This can

be seen, for example, from its treatment of the Sherifian State — that is to say, Morocco under the Sultan — as a "State of a special character" (*I.C.J. Reports 1975*, p. 12 at p. 44, para. 95). In this context Chad's appeal to the rights of "les ... Etats européens au regard du droit international public prévalant alors" (MC, Chap. IV, para. 131) is a sign of the weakness of its case.

14. True, Chad does acknowledge in its Counter-Memorial that the indigenous population had exclusive rights over their territory (CMC, para. 5.17). But that title in its view related to the customary law of the tribes (*idem*, para. 5.18). It did not arise from the 'droit international public en vigueur à l'époque" (*idem*, para. 5.17). Thus the rights of the indigenous people are diminished by reference to their customary law. By definition customary law did not prevail against the colonizer. And the rights of the indigenous populations under their customary law, rights that Chad is prepared to concede, would not avail against the French. So the concession of territorial rights proves to be no concession at all.

15. All this is quite inconsistent with the Court's approach in the *Western Sahara* case. The law the Court was there concerned with was *international* law. The test for the territorial rights of indigenous tribes that it enunciated was a test under *international* law. The customary law of the tribes themselves was no doubt relevant, in that it helped to show the existence of a social and political organization at the local level, and of links between particular tribes. But it is obvious that the Court was not applying or giving effect to some sort of tribal customary law in its own right or for its own sake, as Chad's argument suggests.

16. Chad's analysis of the *terra nullius* point in the *Western Sahara* case occurs, curiously enough, in the context of a discussion of the intertemporal law (see CMC, para. 3.08-12). I say curiously, because as we have seen the case concerned the same period of time as the period under discussion here — the late-nineteenth century. There is no suggestion that international law changed in this regard between 1884, the beginning of Spanish colonization of the Western Sahara, and 1899 or 1913. The Berlin Conference of 1885 certainly did not change it, as I will show.

17. Nonetheless Chad argues that the Court in *Western Sahara* did not intend to exclude the possibility of occupation of *terra nullius*. Chad refers to "l'inexactitude de l'affirmation [libyenne]

selon laquelle dans l'avis consultatif concernant le Sahara occidental la Cour aurait estimé qu'au déebut du vingtième siècle, il était juridiquement impossible d'occuper un territorie, lorsque des tribus qui disposaient d'une organization sociale et politique s'y trouvaient" (CMC, para. 3.38; see also *idem*, para. 3.09). A crucial paragraph in its pleadings is paragraph 3.12 of the Counter-Memorial, which repeatedly uses the term "occupation" and which relies on earlier concepts rejected clearly by the Court in its Opinion. And thereafter Chad is consistent in its use of the term "occupation" (e.g., CMC, para. 3.51).

18. Admittedly there were traces of a narrower view in relation to international law and its application to non-European peoples in the doctrine, and to a more limited extent in the practice of European States in the period 1885-1935. Authorities such as Oppenheim, writing in 1905, drew from the premiss, itself dubious, that international law was a purely Western or Christian construct, the conclusion that it applied only to Western or Christian States, or to other States expressly admitted into the concept and to the concert of nations by them. But that conclusion, referred to and relied on by Chad (CM, para. 130) was a complete *nonsequitur*. Nor has it ever been accepted by this Court. As the Permanent Court pointed out, all that the Treaty of paris of 1856 did was to bring about 'the elevation of the position of Turkey in Europe' (*Jurisdiction of the European Commission of the Danube, 1927, P.C.I.J., Series B, No. 14*, p. 40). It is not merely demeaning but historically inaccurate to say that Turkey's status in international law was somehow created or instituted by that Treaty.

19. In short, whatever the historical or intellectual origins of international law may have been — and much has been written, by Judge Ago and others, to illustrate the diversity of those origins — it was quite capable of applying, in its own terms, to international transactions and relations on a worldwide basis. That was certainly the approach of the classical writers, and it has always been the approach of this Court, in the *Right of Passage* case, to take only one example.

20. On the other hand a meaner and narrower spirit was abroad in the 1880s. It was associated with imperialism and the scramble for Africa, seeking to use the universal heritage of the law of nations for its own particular ends. This "somewhat lofty attitude", as you, Mr. President,

described it in a passage quoted by Chad, had a certain influence (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963) p. 20, cited in CMC, para. 3.12). In 1975, the Court decided — by reference to the very period we are considering — that that "lofty attitude" was not accepted by positive international law. I note that the Court's view is now incorporated in the 9th edition of *Oppenheim* (see R. Jennings & A. Watts ed., *Oppenheim's International Law* (9th eds., 1992, Vol. 1, p. 562, note 2).

21. The first question the Court was asked to determine in that case was whether the Western Sahara was *terra nullius* at the time of its colonization by Spain. The Court first defined its terms. It said:

> "The expression *'terra nullius'* was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* a territory belong to no one — at the time of the act alleged to constitute the 'occupation' . . ." (*I.C.J. Reports 1975*, p. 12 at p. 39, para. 79.)

The issue for the Court, accordingly, was expressed in the following terms:

> 'In view of the Court . . . a determination that Western Sahara was a *'terra nullius'* at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no one in the sense that it was then open to acquisition through the legal process of 'occupation'." (*Ibid.*)

22. What then was the test for *terra nullius*, of whether a territory did or did not belong to someone? The Court said (at para. 80 of the Opinion):

> "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers." (*Ibid.*)

23. An applying that test it went on to hold unanimously that the territory of the Western Sahara was not *terra nullius* as defined (*ibid.*, para. 81).

24. A number of points need to be made about this aspect of the case. The first is the Court's summary dismissal of the different opinions of "certain jurists", or as Judge Dillard put it in his separate opinion, of a certain "measure of doctrinal discord on the subject of sparsely inhabited

lands" (*idem*., p. 124). The doctrinal discord arose from the idea being out about that international law was identified with the European concert of nations, and that rights over territory could only be exercised by or through European States. But such ideas, on which Chad apparently relies, were peremptorily dismissed by the Court.

25. The second point relates to the issue of treaty-making by the tribes. It is true, as the Court pointed out, that Spain had not treated the territory as belonging to no one, but had made a series of agreements with the tribes. That was certainly relevant in confirming the Court's conclusion on the issue of status. But it could not have been decisive in principle, in the sense that a different decision by Spain would have rendered the territory *terra nullius* after all. Although recognition and the practice of third States will be relevant to the question of status, the negative decision of a single State cannot be decisive. Thus if Spain had decided to take the territory by force of arms rather than negotiation, it could not have argued that its conduct was mere occupation of *terra nullius*. The rights of socially and politically organized tribes over their territories were not recognized by international law exclusively to allow those tribes to surrender their rights.

26. The third point to be made about the decision is to contrast the clear and unambiguous conclusion of a unanimous Court with the evasive and taciturn treatment given it by Chad, in particular in its Counter-Memorial. There, Chad accuses Libya of "inexactitude" in affirming that the Court excluded the possibility of occupation in the legal sense in respect of territory which was not *terra nullius* (CMC, para. 3.08). On a plain reading that is precisely what the Court did do, so that one can say that the inexactitude is all Chad's. But, heedless, Chad goes on to refer throughout to the French acquisition of the borderlands as an "occupation". It does so, it says, for two reasons, one general and one particular (CMC, para. 3.12). The general reason is the inter-temporal law. In effect this treats the Court's view of the law in force in another part of the same desert at almost the same period as simply wrong. The second reason, according to Chad, is that "La France avait occupé" in a general and "non-technical" sense — the general and "non-technical" sense referred to by the Court in paragraph 80 of the *Western Sahara* opinion — it leaves open all the questions of the legality, validity and extent of that "occupation". On the other hand if, as seems more likely, it

uses the term in its proper technical sense, then again it ignores or contradicts the Court's decision, and does so without even doing the Court the courtesy of explaining why.

27. One alternative explanation — although it is not something that Chad has so far dared to argue — is that in 1913 the borderlands reverted to being *terra nullius* with the Ottoman withdrawal. There were elements of such an idea in the earlier French claims to the Sudan, and I use here the term Sudan, in its modern sense of what might then have been called the Anglo-Egyptian Sudan. When the followers of the Mahdi took over the southern Nile valley, the French position was that the territory in question had become *terra nullius*. Captain Marchand said exactly this to General Kitchener during their famous and apparently bibulous interview at Fashoda. The Sudan was "abandoned by Egypt and therefore without a legal owner", he said (Marchand's dispatch, *Figaro*, 20 November 1898, quoted in T. Pakenham, *The Scramble for Africa* (1991) 548). This was yet another manifestation of the discredited idea that European civilization was a prerequisite for sovereignty.

28. The position is that territory once occupied by an organized society could only become *terra nullius* by abandonment of sovereignty, equally there is a presumption against territory become *terra nullius*. Since neither recognition as part of the European concert of nations nor "civilization" was required for territory not to be terra nullius, the extension of control over territory by the indigenous people, ousting a European power, could not produce the result that the territory became terra nullius. *A fortiori* with the transfer of title from one "civilized State" (the Ottoman Empire) to another (Italy). Thus there is no basis whatever for the idea that the borderlands became *terra nullius* after Ottoman withdrawal in 1913.

29. So far I have assumed that it is unlikely that the Court would hold that the borderlands are legally *terra nullius*. After all they shared many of the characteristics of the Western Sahara, both in geographical and human terms. The facts in the present case have already been outlined by my colleague, Mr. Maghur. Applying the Court's test of social and political organization, it is quite obvious that the borderlands were not *terra nullius* in 1912, or for that matter in 1899. I would only note that the *sawiya* at Bir Alali contained what was, by the standards of the time, a significant library of 700 volumes. A library is not something one would expect to find in a *terra nullius*.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Mr. Crawford.

Mr. CRAWFORD:

(2) The Legal Status of "Spheres of Influence"

30. Mr. President, Members of the Court, before the pause I was discussing the first of three legal issues as to which the Parties diverge in relation to the pre-1919 law, that is to say, the test for whether territory is *terra nullius*. I turn now to a second issue on which there is a significant difference between the parties, that is to say, the legal status of spheres of influence.

31. To be fair, on this point is ig some measure of agreement. Chad does not argue that the 1899 Declaration had the effect of forthwith creating a territorial boundary. It acknowledges that sphere of influence agreements "ne remettaient en principe pas en question les droits appartenant aux dirigeants indigènes" (MC, Chap. II, para. 55) — although, as we have seen, it now regards those rights as by definition non-existent anyway. It accepts that a sphere of influence agreement is *res inter alios acta* so far as third States are concerned (CMC, para. 8.13). To this unremarkable extent the Parties are agreed.

32. On the other hand it is clear that Chad assumes that a sphere of influence agreement has a certain objective effect, since it says that

> "Quand des Etats, dans un traité, se sont mis d'accord pour établir un tracé entre leurs sphères d'influence respectives ... il s'ensuit que ce tracé prend les caractéristiques d'une frontière internationale quand le titre de souveraineté sur le territoire, dans un sens plus général, est établi... [L]e titre juridique par rapport à la frontière même est celui déterminé par les traités en question." (CM, Chap. II, para. 11.)

If all this means is that, when a State targets a territory for acquisition by agreement with another State, and then actually acquires it, the territory so acquired is the territory targeted, then it is a truism. But it appears that Chad seeks to confer some legal value on the process of targeting, which is another thing altogether. For it says that "la présence effective de la France constitue le *signe* que la ligne définie par les accords ... constituait bien une frontière internationale" (MC, Chap. II, para. 37; emphasis added). In its view subsequent *effectivités* and acquiescence merely "confirment l'existence de ce droit", that is to say, of the pre-existing legal title *(ibid.)*. It was for this reason that

it claims the 1899 Declaration had "une valeur juridique en [elle-même]" (MC, Ch. IV, para. 238).

33. In short, according to Chad, a sphere of influence agreement creates "un titre imparfait" (RC, para. 4.22), *imparfait* perhaps, but a *titre* nonetheless. All that subsequent acquisition of the territory does is to *confirm* that title (cf. CM, Chap. V, para. 127; Chap. V, para. 181; CMC, para. 9.02).

34. In other words on the Chad thesis a zone of influence is a territorial boundary, a territorial status, *manqué*, and only temporarily *manqué*. Recognition by a third State converts the zone into a territorial right, at least vis-à-vis that State, and prevails over any territorial rights or claims that State may have (MC, Chap. IV, para. 121; CMC, para. 3.38).

35. Similarly it was because these treaty rights had, in Chad's view, some sort of objective existence that Chad could argue that they would prevail over the subsequent acquisition of title to the territory by Italy when it succeeded to the Ottoman Empire in respect of its Libyan territories (RC, para. 2.59).

36. So obsessed is Chad with its quasi-territorial view of spheres of influence that despite acknowledging that Article 3 of the 1899 Declaration was not reciprocal (CMC, 8.20), it persists in talking about "implicit" French recognition of a British zone, and about British abandonment of cession of the Sarra triangle to italy in 1934 (*idem*, para. 8.21; see also *idem*, paras. 8.64, 8.74 ("ses propres droits"); MC, Chap. I, para. 24). On this view Italy actually succeeded to Great Britain in 1934 in this important sector (MC, Chap. IV, para. 207). No doubt Chad needs to invent a British zone on the other side of the 1899 line in order to pursue the thesis that the territory on the other side of the line, on the British side of the line, was not Ottoman or Italian but British or at least — on Chad's view of spheres of influence — virtually British. The remarkable consequence, according to this reasoning, is that the line was an international boundary between Britain and France, the parties to the 1899 and 1919 agreements (RC, para. 4.21). Mr. President, it is sometimes said that Great Britain acquired its Empire in a fit of absence of mind and this would be only the most striking example of that phenomenon.

37. Against this background of Chad's inflation of the concept of spheres of influence, it is

something of a relief to turn to the law. The essential point is that the term "sphere of influence agreement" — like many other terms which developed at the time of Western colonization — is a descriptive label, not a term for a separate legal status. One can say the same thing, for example, about protectorate. The question is not how to define "sphere of influence agreement" but what are the incidents of the particular transaction. In the present context, the question is what are the terms of the relevant treaty, and what are its effects as a treaty.

38. So that is all that a sphere of influence agreement is — a treaty — as the Court made clear in the *Western Sahara* case, in another passage not cited by Chad. The Court had been referred to a number of such agreements entered into by Spain, France and Germany and relating to Morocco. It is a characteristic of spheres of influence agreements that they relate to the territory of a third party. By a strange irony, in that case the agreements were relied on by the victim, Morocco, as showing the extent of the territory then recognized as belonging to it. The Court disagreed. As paragraph 126 of the Opinion says:

> "These agreements ... are of limited value ... for it was not their purpose either to recognize an existing sovereignty over a territory or to deny its existence. Their purpose ... was rather to recognize or reserve for one or both parties a 'sphere of influence' as understood in the practice of that time. In other words, one party granted to the other freedom of action in certain defined areas, or promised non-interference in an area claimed by the other party. Such agreements were essentially contractual in character." (*I.C.J. Reports 1975*, p. 12 at p. 56, para. 126.)

39. The Court's dismissal of spheres of influence as "essentially contractual in character" is in no way a retrospective rationalization of an unsavoury phenomenon. It reflected the best understanding of the colonial powers themselves at the time. This is what Sir Eric Beckett, then Second Legal Adviser at the British Foreign Office, said of spheres of influence agreements in a memorandum of 29 August 1934:

> "Spheres of influence in international law, whatever their political significance, mean nothing at all. If a state admits it has not sovereignty over a territory, but only claims a sphere of influence over it, then apart from treaty obligations binding particular powers not to enter the sphere of influence ... legally any other power can go there and take steps to make itself sovereign." (CML, Exhibit 12.)

40. In short, spheres of influence agreements were nothing more than treaty arrangements

between States, governed by the law of treaties, and not in any sense territorial arrangements governed by the law of territorial status. And that simple but sufficient view of them enables one to answer a range of otherwise perplexing questions about them.

41. To take the simplest issue first, what was the legal effect of spheres of influence agreements? The answer is that they were purely bilateral, and gave rise to no rights of a territorial character at all. It is necessary to insist on this, if only because of the variety of phrases used by Chad to try to conure up some form of legal status deriving from the 1899 Declaration and the 1919 Agreement. In particular, a sphere of influence agreement had no effect in exempting the State whose sphere it was from compliance with the international law requirements for the acquisition of territory. A sphere of influence agreement did not change the applicable law relating to the acquisition of territory. It did not create an inchoate title — as discovery of uninhabited territory might perhaps have done in earlier centuries. Its effect was purely negative and essentially political: it was that, if complied with, it took a potential rival out of the picture.

42. This can be seen even from Chad's best efforts to give the "institution" (Chad's word) of spheres of influence some juridical content. For example it says that:

> "le droit applicable aux zones d'influence était ... bien fixé : si leur reconnaissance ne constituait pas un titre territorial opposable aux tiers, elles n'étaient pas moins, dans l'immense majorité des cas, le prélude à l'établissement, de part et d'autre de la ligne convenue, de la domination coloniale des puissances signataires" (CMC, para. 8.15).

But the proposition that such agreements were a prelude to colonial domination is not a proposition of law at all. The prelude was a mere preliminary, and one lacking intrinsic legal effect so far as the territory itself was concerned. Similarly in its Reply Chad admits "qu'un traité établissant une sphère d'influence ne créait un titre suffisant à la souveraineté mais constituait un simple 'pas' vers celle-ci" (CR para. 4.08.). But a "pas" is no more a juridical institution than a "prélude". The trait is that Chad is covertly inventing such an institution, an institution never distinctly recognized or endorsed by international law.

43. A second question arises. What would the legal effect be of the recognition of a sphere of influence agreement by an interested third State? The question assumes the intermingling of two

problematic concepts — "spheres of influence" and "recognition". Recognition is merely an act of a State, which may take a variety of forms, accepting a given situation. What the legal consequences may be of that act, at the time or prospectively, will depend on the circumstances of the case and ter terms used by the parties. Here as elsewhere "recognition" has no magical effect. But in so far as generalizations are possible one can say this. Recognition, although it may give rise to the opposability of a legal status or situation, does not alter the situation, does not change something from one king into another kind. In particular, recognition of a sphere of influence by a third State does not change the sphere of influence into something which it is not, such as a territorial title.

44. And then thee is a third question. What would the legal effect have been of the breach of a sphere of influence agreement, so far as title is concerned? For example, what would have been the legal effect of a State acquiring territory on the wrong side of the line of a sphere of influence agreement to which it was a party, or which it had recognized? The answer is clear. Since the sphere of influence agreement is merely a bilateral treaty obligation, the answer must be that such an acquisition, by a State, notwithstanding that it breaches the treaty, would be legally effective as against the world. Vis-à-vis the other State party, the acquisition might be a breach of the treaty, and that might call for reparation, or it might be cured by recognition by the injured State, or it might simply be ignored. But just as a State does not lose sovereignty over territory by violating a bilateral treaty obligation with respect to that territory, so it does not cease to acquire territory because its acquisition violates a bilateral treaty.

45. To summarize this section of my argument, spheres of influence agreements were simply arrangements between potential colonizers, which could give rise to obligations as between the parties, but which inherently lacked objective legal effect, and which could not themselves give rise to territorial titles. Moreover they were not a distinct juridical category. What particular legal effects they had, as between the parties or as against a third State which had recognized them, depended always on the terms of the agreement or recognition considered in the light both of the law of treaties and of the law of territorial status, to the latter of which they were essentially alien.

46. In discussing this issue I have assumed, for the sake of argument, that Article 3 of the

1899 Declaration created a sphere of influence agreement in the sense in which I have been using that term. Certainly Chad regards it as a classic example of the "type" (MC, Chap. II, para. 54). But here again, Chad's argumentation suffers from what I can only call closet colonialism, the tendency to see in every action, in every transaction, a confirmation of colonial claims even though these bore no relation to reality. As Mr. Sohier has shown Article 3 of the 1899 Declaration was a very particular arrangement. It took the form of a negative and unilateral stipulation, one which was obviously not a disposition of territory in any sense. Thus the Article 3 line did not even create a sphere of influence "properly so-called", if one can have a sphere of influence "properly-so called", and it is incapable of having the important effects Chad claims for it.

(3) The Test for Sovereignty over Desert Areas: Control and Allegiance

47. Mr. President, Members of the Court, I turn now to deal with the third and no doubt the most important of the legal issues which are raised as to the law of territorial title before 1919. The issue is the following: what is the test in international law for the acquisition of sovereignty by a State over areas such as the borderlands? I assume for the purposes of this discussion that the areas were not at the relevant time *terra nullius*, and that their legal status was unaffected by the Declaration of 1899.

48. Again, on this issue the Chad pleadings are remarkable for their inconsistency and reticence. Having initially attributed sovereign rights over the borderlands to the Senoussi (MC, Chap. V, para. 177), Chad subsequently makes a *volte-face* — in its own words a retreat to a position "plus nuancée — and argues that the entire notion of sovereignty was inapplicable at the time before French "occupation" (CMC, para. 1.33).

49. According to Chad, the Senussi Order was incapable of possessing "un titre juridique international — autrement dit, des droits de souveraineté — sur le territoire dont il est question" (CMC, para. 5.136). The reason is that non-State entities could then possess no rights at all in international law (*idem*, paras. 5.137, 5.139, 5.164-5), as distinct from under their own customary laws (*idem*, paras. 5.167 ff.). Chad seeks to exorcise the spectre of Senoussi rights, because to acknowledge those rights would be to ignore totally "les droits souverains acquis par la France en

conformité avec les règles du droit international en vigueur à l'époque, aussi critiquables que celles-ci paraissent aujourd'hui" (CMC, para. 5.191). That argument tends to overlook the point that the very issue in this case is whether French sovereign rights over all or part of the borderlands were "acquis . . . en conformité avec les règles du droit international en vigueur à l'époque", and that to decide this issue it is impossible to overlook the role of the Senoussi. Chad's argument precisely inverts the issue, as if the Senoussi came *after* the French.

50. And in its Reply Chad goes further, dismissing the Senoussi with a wave but without a tear. Of this former sovereign entity, it says only that "il ne paraît pas utile de revenir à ce stade" (RC, para. 2.27).

51. Similarly the tribes themselves had no relevant rights: in a world confined to sovereign States, mere tribes could have no "droits souverains — c'est-à-dire de droits relevant du droit international public" (CMC, para. 5.183). Anyway the rights of indigenous peoples, according to Chad, are "un sujet, en soi, non dépourvu de controverses" (CMC, para. 5.181) — blithely ignoring the point that the issue here is the right of an indigenous people to their own lands before colonization, not the position of an indigenous remnant whose independent status and rights have already been lost.

52. Nor does the Ottoman Empire fare any better. According to Chad, the Ottoman Empire's influence in the borderlands before 1908 was "fort ténue — si même elle en avait une". And that influence, if any, "ne s'apparente en aucune manière à une quelconque souveraineté territoriale" (MC, Chap. IV, para. 130). After 1908, Chad grudgingly admits, the Ottoman position improved, but not by much. Chad accepts that Ottoman presence in the borderlands *might* have led to an acquisition of sovereignty (CMC, para. 135), and that the Ottoman Empire, unlike the Senussian tribes, could benefit from international law in force at the time. But the problem now is that the Ottoman presence was too transitory (*idem*, para. 137).

53. In summary, Chad appears to argue that, because none of the three interested parties, the Ottoman Empire, the Senussi and the tribes, themselves exercised the full range of powers in international law (and indeed two of the three definitionally could not have done so), therefore no

rights a tall existed over the territory in international law. The argumentative strategy could be described as that of "divide and conquer" — no doubt Chad would prefer to say, "divide and occupy".

54. Turning now to the applicable law, one starts from the basic proposition that — in the words of the Permanent Court in the *Eastern Greenland* case . . .

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual display of such authority" (*P.C.I.J., Series A/B, No. 53*, pp. 45-6).

This statement, of course, related to a dispute involving acquisition of sovereignty by essentially peaceful means on territory not claimed by any other State. With respect to the borderlands before 1913, that was the position of the Ottoman Empire, not that of France. With respect to the position after 1913, France was not a peaceful occupant, and it found itself at all times opposed to the claim of Italy as the successor of the Ottoman Empire.

55. Nonetheless on this issue I should again record some points of agreement between the Parties. First, we agree that there is a distinction in law between the acquisition and the loss of territorial sovereignty. The acquisition of territorial sovereignty is something which has to be demonstrated, and is not to be presumed. In particular it is not to be presumed from the mere existence of agreements between third States, such as sphere of influence agreements (cf. *I.C.J. Reports 1975*, p. 12 at pp. 49 ff.). By contrast, once territorial sovereignty has been acquired there is a presumption that it has not been abandoned: temporary absences (such as in time of armed conflict or civil war) do not readily lead to the result that the former sovereign has been displaced. The second point of agreement is this: there is no strict or invariable standard of territorial administration for determining who is the territorial sovereign at a given time. International law takes account of differing circumstances. If a dispute over title arises, the issue is: which of the potential claimants has the better case. And thirdly, it is necessary in assessing claims to sovereignty to bear in mind the nature of the terrain, and the necessary adaptations to terrain and climate made by the local people (see *I.C.J. Reports 1975*, p. 12 at p. 41, para. 87).

56. On these three points Chad and Libya are agreed: it will be a matter for my colleague, Professor Dolzer, to show how they applied to the borderlands at the relevant time, that is to say, for present purposes, the period immediately before 1913.

57. But this raises the question of what test is to be applied in determining the legal validity of claims of sovereignty to territory such as the borderlands. This issue underlay the second question asked of the Court by the General Assembly in the *Western Sahara* case. But Chad's analysis of this aspect of the decision, as of the first issue dealing with terra nullius, is cursory (see CMC, paras. 5.185-93, esp. para. 5.192). It asserts that the case stands for no general legal doctrine: "Cet avis ne vaut que pour le contexte historique spécifique sur lequel il porte" (CMC, para. 5.186). But any way according to Chad the case would not avail Libya here. The reason is as follows:

> "L'existence d'un lien juridique d'allégeance entre le Sultan du Maroc et quelques-unes des tribus occupant le territoire, et une démonstration manifeste de l'autorité du Sultan sur ses tribus n'ont pas été jugées [par la Cour] suffisantes pour fonder un lien juridique de souveraineté territoriale. Mais même si l'on reconnaissait l'existence de liens quelconques entre les tribus indigènes du B.E.T. et les Senoussistes, il faut noter que la Libye n'est pas dans une position comparable à celle du Maroc dans l'affaire du Sahara Occidental." (CMC, para. 5.192; reaffirmed without elaboration in CR, para. 4.19.)

58. It is useful to analyse the reasons why this Court rejected Morocco's claim to have been sovereign over the Western Sahara before 1884, not least because Chad, in the passage I have just quoted, seriously misstates and misunderstands those reasons.

59. First of all, Morocco's claims were based essentially on "immemorial possession" (*I.C.J. Reports 1975*, p. 12 at p. 42, para. 90), but that claim, the Court found, was based on "equivocal" evidence (*ibid*).

60. The main internal manifestations of Moroccan control over the territory derived from "evidence alleged to show the allegiance of Saharan caids, that is to say sheikhs, to the Sultan . . ." (*I.C.J. Reports 1975*, p. 12 at p. 45, para. 99). It is important to note that the Court did not reject the relevance of the argument based on allegiance. Far from it: it had earlier expresaly accepted that the special character of the Sherifian State must be taken into account (*I.C.J. Reports 1975*, p. 12 at pp. 43-4, para. 94). In that context, it noted that this special character . . .

> "consisted in the fact that it was founded on the common religious bond of Islam

existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory. Common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler . . . Political ties of allegiance to a ruler . . . if [they are] to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority." (*I.C.J. Reports 1975*, p. 12 at p. 44, para. 95.)

61. Note that the distinction the Court is making here is not a distinction between allegiance on the one hand, and effective political control on the other. It is a distinction between authority, on the one hand, and on the other hand allegiance of spiritual or religious character which is *not* associated with any form of political subordination or acceptance of political control. No doubt the followers of a particular religion may be subject to special demands, over and above the allegiance which flows from belonging to a given State. But this Court is not a court of conscience associated with a given religious tradition. Its concern is with the actual exercise of political control, including through the allegiance of a people or group to a superior authority. No doubt the existence of religious respect or attachment may be a *reason* why a people or group accept the authority of a superior. But it is the acceptance, and the manifestation of that acceptance, which matters.

62. And it was precisely this acceptance, and its manifestation, that Morocco could not sufficiently demonstrate in the *Western Sahara* case. It is not, as Chad asserts in the passage I have already quoted (CMC, para. 5.192), that the existence of a juridical link of allegiance between the Sultan of Morocco and numbers of the tribes, combined with a manifest demonstration of the Sultan's authority over the tribes, was judged by the Court to be insufficient to establish sovereignty. It is that the juridical link of allegiance and the manifest demonstration of authority were not shown to exist *at all*, or to any significant degree. In effect the Court accepted Spain's argument that the documentary and other items of proof of the Sultan's authority related to areas of southern Morocco itself, and not to the disputed territory (see *I.C.J. Reports 1975*, p. 12 at p. 46, para. 100, 47-8, para. 104-5). Expeditions made by the Sultan to the area, on which Morocco relied, did not reach the area (*idem*, p. 46 paras. 100-1, pp. 47-8, para. 104). The appointment of caids would have been relevant, but again these appointments related only to area within Morocco itself (*idem*, p. 47,

para. 103. It was not that the allegiance of the tribes would not have been relevant to the Sultan's claim to exercise authority: the Court held there was "no convincing evidence" of such allegiance.

63. Indeed it was precisely because there was evidence of the allegiance of some of the tribes of the territo.,' (though not the most important ones) that the Court was able to hold that there were legal links at the relevant time between the territory and Morocco (see especially *idem*, pp. 48-9, paras. 105-7).

64. This conclusion was not displaced by the evidence of international arrangements, including spheres of influence agreements, relating or arguably relating to the territory (see *idem*, pp. 49-57, paras. 108-129). On the contrary both the internal and the international evidence supported the Court's conclusion that the Sultan's role in the territory was limited to political influence as distinct from direct or even indirect control (*idem*, pp. 56-7, para. 129).

65. In its assessment of the arguments for Moroccan sovereignty before 1884, the Court must have been influenced by the evidence of competing legal links with a non-State entity, the so-called Mauritanian entity. (I pause here, Mr. President, to note that on the case presented by Chad, the very idea that there could have been international legal links with a non-State entity is a contradiction in terms — yet another example of Chad's tendency to ignore or contradict the Court's reasoning.) By contrast the Court was perfectly prepared to countenance that idea, citing the *Reparations* case (*I.C.J. Reports 1949*, p. 149). The point for present purposes, however, is that the overlapping between the Moroccan and the Mauritanian claims itself militated against the Moroccan claim, which was a claim to territorial sovereignty, a claim by its nature exclusive.

66. The Court may obtain some assistance in determining the question presently under discussion from the decision of the Court of Arbitration in the *Sharjah-Dubai* case, which is now reported in the International Law Reports (case concerning *the Border between the Emirates of Dubai and Sharjah* ((1981 91 *ILR* 543). The Court of Arbitration had to deal with a territorial dispute involving an arid area of the Arabian peninsula. The dispute concerned territory occupied by the Bani Qitab, a nomadic tribe which, although it generally owed allegiance to the ruling family of Sharjah, was independent-minded and was not above concluding temporary alliances with other

rulers.

67. The Court of Arbitration observed that, especially in earlier times, it was by way of the allegiance of the various tribes that the control, and thus the sovereignty, of Sharjah was largely exercised. Thus it saw allegiance and control as dual criteria, as complementary criteria, for sovereignty, with deficiencies in the one able to be compensated for by the presence of the other.

68. It stressed the importance of the time and the place at which the issue arose, noting that . . .

> "The two criteria of allegiance and control must . . . in their application, have regard to the region under consideration. In the interior of the disputed boundary area the criterion of control may be of very limited significance in the distant past, but perhaps of slightly greater significance in the more recent past. This is still a desert region with a nomadic population." ((1981) 91 *ILR* p. 543 at p. 589.)

69. The Court of Arbitration went on to apply this dual test to the Bani Qitab, paying special emphasis to the question of allegiance. It concluded:

> "that the Bani Qitab who inhabit the disputed territory owed allegiance to the Ruler of Sharjah, even if at times there were temporary interruptions to this link." 91 *ILR* p. 543 at p. 652.)

70. I should add that the Court of Arbitration found it necessary to distinguish the *Western Sahara Opinion*, a habit that seems to be catching. That case, it said, "concerned a situation very different as to region and as to period" (*idem*, p. 641). Perhaps it thought that this Court did not pay sufficient attention to the possibility of indirect Moroccan control through the allegiance of the tribes of the Western Sahara. It also stressed — and who can deny it — that "each territorial problem has its own specific characteristics" (*ibid.*). But, as I have tried to point out, the Court in the *Western Sahara* case fully accepted the idea that control might be manifested by the allegiance of a tribe or people, provided the allegiance was genuine and was manifested in some way. It certainly did not regard it as necessary for that manifestation to take any particular form, such as the payment of taxes.

71. So the two decisions are entirely consistent — as can be seen by the weight that this Court paid, in the *Western Sahara* case, to the criterion of allegiance in relation to southern Morocco. It

was precisely the factors which Chad claims were inadequate as proof of sovereignty over the Western Sahara that this Court accepted — in their application to the southern tribes of Morocco — were enough to establish the sovereignty of the Moroccan State in that region.

72. By way of summary, it is possible to look at the situation in the borderlands in 1912 in two different ways — one of them is based on the idea of partnership, the other is based on the idea of coalescence in a hierarchy. Following the line of partnership, one can treat the situation as based on some form of shared rights or shared sovereignty. International law certainly allowed for this, for example in the context of the various forms of protectorates. The division of sovereign competences between different units is nothing extraordinary, whether within a federation, a condominium or in some other political structure.

73. Alternatively, one can seek to identify the entity in which allegiance, administration and social organization coalesce, even though none of the social or political units within the entity is alone the repository of all these elements, and even though the relations between the various units may sometimes be strained. Provided the subordinate unit has not entirely broken away and asserted its independence, it is proper to treat the entity as a whole as a single State: this is what the Permanent Court did, for example, in the case of *Lighthouses in Crete and Samos, 1937, P.C.I.J., Series A/B, No. 71.*

74. What one cannot do is to deny the relevance of popular sovereignty or participation at either level — in the present case, deny that the Senoussi people had real legal rights, and at the same time deny the relevance of their activities and allegiance in the constitution of Ottoman sovereignty. And this reductivist approach is precisely that taken by Chad. On the contrary, the consequence of applying the rules and principles I have referred to is that in 1912 the Ottoman Empire had sovereignty over the territory occupied by the peoples submitting themselves to its authority — that is to say, to all the Senoussi peoples. And this conclusion follows whether one adopts as the appropriate form of analysis the idea of partnership or that of coalescence within a hierarchy. Either way the Ottoman Empire was sovereign over the territories concerned in this case by reason of the combination of its own claims and of activities carried out under its auspices, and

not adversely to it.

(4) Two Associated Issues: The Hinterland Doctrine and the Relevance of the Berlin Conference

75. Mr. President, Members of the Court, before moving to discuss the impact in the present dispute of the changes resulting from the League of Nations Covenant and subsequent instruments, I should touch briefly on two other issues — first, the hinterland doctrine; secondly, the impact of the Berlin Conference on the legal position of the Ottoman Empire.

76. The issue of the Ottoman Empire's long-standing *hinterland claim* has been discussed in the Replies of both Parties (RC, paras. 2.06-2.26; RL, para. 7.57). Hinterland claims were no substitute for the control of and acceptance of authority by the people of the territories concerned. On the other hand, the idea that sovereignty over coastal territory generated some form of hinterland did have a considerable influence, and there was room for the recognition of hinterland claims in international law as supplementary to the basic tests of allegiance and control. Hinterland claims also served various external functions, in particular in making clear the *animus occupandi* of the claimant States. After all a hinterland was a zone appurtenant to sovereign territory, and a hinterland claim — unlike a sphere of influence agreement — was thus a claim to an existing sovereignty.

77. It should also be said that there is an important difference between hinterland claims which were based merely on geography — sector claims one might call them — with those based on social organization. Even geographical hinterland claims achieved a level of recognition at the relevant time, as has been seen. By contrast the Ottoman claim was to a hinterland where the peoples were known to and by the claimant State, and which to a considerable extent accepted its authority.

78. The second issue to which I should briefly refer is the relevance of the Final Act of the Berlin Conference of 1885 for the present case. Chapter VI of the Final Act was entitled "Declaration relative to the Essential Conditions to be Observed in Order that New Occupations on the Coasts of the African continent may be held to be Effective". Chapter VI consisted of two articles. For present purposes the relevant one is Article XXXV, by which the States parties

recognized . . .

> "the obligation to ensure the establishment of authority in regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit . . ." (ML, International Accords and Agreements Annex, Vol. 2, No. 1.)

In terms this applied only to occupation along the coasts, although it was in practice later applied also to acquisitions inland. But the important point for present purposes is that it was agreed that Chapter VI would only apply to "new occupations", and therefore that the existing territorial rights of the Ottoman Empire were not affected. The distinction thus drawn between the acquisition of new titles and the maintenance of existing rights is also reflected as we have seen in general international law. Where the local population accepted and coexisted with claims to sovereignty made by the Ottoman Empire, claims to that sovereignty were legitimate and could be recognized. The assertion of a new title, against the wishes of an existing sovereign and of the people of the territory, was quite another matter.

C. THE IMPACT OF THE MODERN LAW OF TERRITORIAL TITLE

79. Mr. President, Members of the Court, I now turn to the final stage of my presentation, which involves an analysis of the developing modern law of territorial status so far as relevant to this case. There was of course a considerable degree of continuity in the law. Thus the basic elements of "continuous and peaceful display of actual power in the contested region" continued to apply in the case of territory not claimed by any other State (*Island of Palmas* case (1928) 2 *UNRIAA* at p. 857). In the case of territory belonging to another State, the presumption against abandonment of sovereignty continued to apply, and also the protection offered to vested rights by the rather strict rules on extinctive prescription, if indeed that institution existed at all, especially in cases where the displaced sovereign continued to protest against its displacement. But in addition, the law after 1919 developed in the direction of prohibiting any acquisition of territory by the use of force.

80. The first stage in this development was Article X of the Covenant of the League of Nations, intended to outlaw war as a means of challenging the territorial integrity of States. It provided that:

> "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

Chad argues (CMC, paras. 3.43-49) that any such obligation extended only to other Members of the League, and that States Parties to the League remained free to commit acts of aggression against the rest of the world. The argument is not only controversial but irrelevant. For Italy was a Member of the League, and under the Treaty of Ouchy Italy had succeeded to the Ottoman sovereignty in Libya in its full extent — a succession unconditionally recognized by France.

81. But quite apart from this, there is real difficulty in supposing that the Covenant left Member States entirely free to resort to war against non-Members, or against peoples like the Senoussi who lacked recognition as State entities. For if international law recognized their capacity to hold territory, so that their lands were not *terra nullius*, it would make little sense to recognize their legal title, but to deprive that title of all protection. The new principle of the outlawing of war was coherent only if it protected the territorial integrity of all entities and peoples whose title to territory was recognized by the law.

82. In any event it was France itself that initiated the 1928 General Treaty for the Renunciation of War, the Pact of Paris, which contained a further general renunciation of war. It provided that:

> "the High Contracting Parties solemnly declare . . . that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another".

83. Mr. President, it is sometimes said that the manifest failures of the 1930s, the collapse of the League, the failure of the Covenant and the Pact of Paris to maintain the peace, the tragedy of appeasement, together had the effect of cancelling the progress that was made after 1919. But the fact is that international law was invoked in the 1920s and the 1930s against aggression. And the proposition that international law prohibited conquest, even in the inter-war period, was widely accepted.

84. Moreover, that proposition related to two other aspects of the rules of territorial title which had their roots in the old law. The first was the idea that the control of territory had to be

peaceful and uncontested: as Professor Bowett will show, the French attacks on the borderlands were neither peaceful nor uncontested, whether by the Senoussi tribes or by Italy. Even traditional international law allowed a displaced sovereign to maintain its rights over quite long periods of time by protest, and that position can only have been reinforced under the developing régime which sought to prohibit the use of force in international relations altogether.

85. The second aspect of the traditional law which can only have been reinforced by the developments after 1919 related to the place of conquest itself as a root of title. It is sometimes loosely said that conquest was an alternative to cession as a mode of acquisition of title. But the real position was that conquest might lead to a cession of territory which was valid although the defeated State had no choice but to consent. The characteristic of the old law was not that conquest as such was a root of title, but that treaties were valid even if they had been procured by the use of force. And the traditional law also took account of the one situation with which treaties of peace or treaties of cession could not deal — that is to say, *debellation* the situation where the opposing State had been extinguished, so that there was no subsisting title-holder, no one who could conclude the treaty of cession. In the borderlands, there was neither cession nor *debellatio*. On the contrary there was consistent protest from Italy, and an acceptance by both parties that the limits of the respective possessions of France and Italy were yet to be determined.

D. CONCLUSION

86. Mr. President, Members of the Court, in this as in other respects Chad's position is a curious one. It does not deny that now the law prohibits the acquisition of territory by force, or the use of force against peoples whether or not they are organized in a State. It apparently accepts that the *Western Sahara* case reflects the modern position — or why would it discuss it under the rubric of the intertemporal law? All these developments in the law Chad accepts, but it seeks by all means to delay their coming, to hold them off until its title to the borderlands can have been perfected, even if in ways which it accepts were "critiquables" (CMC, para. 5.191). In these respects Chad's position reminds one a little of Saint Augustine before his conversion — Lord, make me just, but not yet> But the comparison fails in this respect: it assumes that the conduct would have been effective

to achieve the result desired by Chad even under the old dispensation. And that, as Professor Bowett will now show, was by no means the case.

Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Crawford. Professor Bowett.

Professor BOWETT: Thank you, Mr. President.

CHAD's CLAIM TO TITLE

Mr. President, Members of the Court, my task is to examine Chad's claim of title to the borderlands. I use that phrase deliberately. Chad would prefer that we discuss simply an issue of *boundaries*: but a boundary presupposes that the States on either side of that boundary possess a valid *title* to the territory. And you cannot ask a court to determine a boundary without satisfying the court that you have title to all the territory on your side of the boundary.

1. Chad's three theories justifying the so-called 1899-1919 line

Chad bases its case for the so-called 1899-1919 line on three theories.

First, that by Article 3 of the 1955 Treaty, the Parties had agreed that the boundary should be the line already established by the international acts listed in Annex I.

Second, that the 1899 line, although not originally a true boundary, had become a true boundary by reason of French occupation *(effectivités)* between the years 1913 and 1919 and recognition of that line as a boundary by both Great Britain and Italy.

Third, and irrespective of any treaties, the same line had become a boundary by 1919 based on French *effectivités* alone.

Now I do not dispute Chad's right to advance as many theories as it wishes. But when the Court comes to judge these theories, the Court's reaction must depend to some extent on the consistency with which these theories have been advanced. Novelty may not be fatal. But it justifies a certain scepticism.

Chad undoubtedly claims by succession to France. Yet it is clear that before the United

Nations in 1950-1951 France was advancing a different theory. This was that the 1899-1919 boundary was already established by the international acts: not by the 1955 Treaty, as in Chad's first theory. For France did not, and could not, rely on the later 1955 Treaty. Nor did France rely on occupation or recognition as in Chad's second and third theories.

Indeed, as we have seen, the effect of Article 3 of the 1955 Treaty was to *exclude* reliance on *effectivités*, and this was quite intentional on the part of France. France wishes to base the negotiations with Libya exclusively on the treaties in Annex I, following the advice of the French Governor-General of the AEF. The reason why France wishes to avoid all reliance on effectivities is not clear from the records. It could be that France had no conviction that its own occupation met the required standard of effectiveness. Certainly France was worried about Italian claims based on occupation and in the 1935 negotiations between France and Italy, France avoided all discussion of *effectivités*. It may even be that France recognized that an occupation based on military force was highly-questionable, legally, after 1919. But, whatever the reason, the fact is that in 1955 France did exclude any claim based on *effectivités*.

The result is that, in so far as Chad's second and third theories *do* rely on French effectivités, those theories are now suspect on two grounds.

(i) Consistency: how much credibility ought to be attached to a claim when the grounds on which the claim is based have been changed so radically over the years?

(ii) Succession: if Chad claims title by succession to France, is it open to Chad now to claim that same title on grounds quite different from those advanced by the predecessor State, France? It is difficult to see that a radical change in the *basis* of title in the claim by a successor State gives it much credence. On the contrary, the existence of inconsistency between predecessor and successor State will tend to diminish the credibility of the claim.

2. Chad's Reliance on effectivités

Even if Chad is entitled to rely on French *effectivités*, despite Article 3 of the 1955 Treaty, both the second and third Chadian theories face insurmountable obstacles.

Essentially, Chad must make a choice. Either it must argue that the territory was *terra*

nullius, so that France acquired title by occupation. Or that the territory, not being *terra nullius*, was acquired by conquest.

Let me take those two hypotheses in turn.

(a) Occupation of Terra Nullius

The borderlands could not possibly be characterised as *terra nullius* between the years 1913-1919. So this hypothesis fails at the outset.

But even if that were not so, Chad's thesis would face serious difficulties, for Chad would have to show that, on the facts, France had, between the years 1913 and 1919, established an effective, peaceful possession of the territory in accordance with the criteria prevailing in the law at that time. Chad does not, and cannot, substantiate such a claim.

(i) The Facts

Between 1909 and 1913 the French military advance northwards had halted on instructions from the French Government. The Ottoman forces, in co-operation with the local tribes organized by the Senoussi, held the borderlands, and a sort of *de facto* boundary between the two opposing sides emerged. You can see this line on the map now displayed on the screen (Map No. 48). In 1912, the Ottoman forces were at Bardaï, Zouar, Aïn Galakka, Baki (near Fada) and Oum Chalouba.

Chad, in its Counter-Memorial (paras. 6.51-6.55) suggests that France halted its invasion simply because it had no wish to embarrass an ally, the Ottoman Empire. The reasons do not matter. The facts are that the French realised they were opposed by the Ottoman-Senussi alliance; that France knew the Ottomans and the Senussi occupied the territory under a claim of right, and that any further movement northwards by the French would lead to hostilities.

Then the situation changed. After the Italian invasion of Tripolitania-Cyrenaica, the Ottoman Empire was defeated, and under the Treaty of Ouchy the Ottomans were required to withdraw the Ottoman administration from these areas. By March 1913 the Ottomans had withdrawn, leaving the Senussi to fight alone. By June 1913 the French Government authorized Colonel Largeau,

commanding the French A.E.F. forces, to enter Borkou. In authorizing the advance of French forces into the borderlands, the French Government was not motivated by the desire and intent to occupy this region. It was purely a defensive move into what the French military called the "northern front" in order to protect the more fertile and populated regions lying sough of 15O N latitude, which the French were then in the course of occupying, ultimately with the reluctant agreement of the peoples living there. The absence of an intent to occupy the region is specifically shown by the three French decrees issued between 1900 and 1906 relating to the military administration of the AEF (ML, paras. 4.115-4.120).

Ain Galakka was attacked in November of 1913, Faya in December and Gouro a few days later. A French column reached as far north as the Sarra Wells in April of 1914, some 100 kilometres north of where the *Livre jaune* map would have placed the line (Map No. 81). But these military penetrations had no permanence. Indeed, the expedition to the Sarra Wells was designed simply to see whether they could be destroyed. The columns struck wherever they perceived Senoussi resistance to be found in strength, and then withdrew. Only two small outposts were left in the north of Borkou and in Ounianga: one at Gouro and one at Ounianga-Kebir.

However, the French then moved against Tibesti from another direction (Map No. 81). This time a French column came, not from the south where the French forces under Colonel Largeau had operated, but from the west, from French West Africa (the AOF). Zouar was occupied in December of 1913, Bardaï in July of 1914, and reconnaissance patrols were dispatched to Aouzou, Yao, Wour and Kayougue.

However, the French then came under pressure because of fierce Senoussi resistance, and the French decided to disband the column in Tibesti. It was disbanded in October of 1914, leaving a detachment of some 80 men at Bardaï, and an even smaller detachment — two sections only — at Zouar. But by the end of July 1916 both these detachments were withdrawn.

So, in Tibesti, there was no French presence of any kind, from July 1916 until November 1929, when one French company — say 90 men — re-entered Bardaï.

As regards Borkou and Ennedi, the French remained at a few, isolated posts (Map No. 82).

Chad's Counter-Memorial (para. 6.74) suggests there was a battalion at Mao, and two further companies at Faya, and Fada, with additional small posts at Aïn-Galakka, Gouro, and Ounianga. We are not told the numerical strength of these troops, but we are probably speaking of a maximum of 300-400 men — to establish an effective occupation over an area about four-fifths the size of metropolitan France. And, significantly, apart from this purely military presence, we have no evidence of any civil administration or any intention to establish an effective government of the territory. The tribes were left to govern themselves. The concern of the French was to protect their garrisons, the caravans, and "Chad utile" to the South.

It must be borne in mind that Chad's case is that the French title, based on occupation, was perfected b y 1914, or at the latest 1919. (Chad's Memorial uses 1919, but the Counter-Memorial, para. 6.23, advances the date to 1914.) That choice of dates is interesting. Why, it may be asked, does not Chad rely on French *effectivités* in the 1920s or the 1930s? Chad itself does not provide the answer, so we must speculate. Is it that Chad wishes to demonstrate that a French title was perfected in 1919 so as to coincide with the 1919 Anglo-French Convention: and thus make the Italian claims in the 1920s and 1930s claims to a cession of French territory? Or is it that Chad accepts that French military conquest after 1919 was prohibited by the Covenant of the League? Or is it that 1914 is a more attractive date because it avoids highlighting the impact of the League Covenant in the way 1919 does? Or perhaps because in 1914 the French were still in Tibesti? We shall have to refer to each hypothesis in due course.

If these, then, are the facts, we need to examine whether, by reference to the criteria established by the law at that time, France could have acquired a valid title based on occupation.

(ii) Application of the criteria for title by occupation

As Professor Crawford has explained, the traditional requirements for an effective occupation are twofold: *animus occupandi* — the intention to occupy as sovereign, and *corpus occupandi* — evidence of effectiveness. As to the first, it seems clear from what I have already said of the French military incursions that there was no intention at that time — I speak of 1913-1919 — to establish sovereignty. France knew its resources were too few. The most it could hope for was to use its

limited military resources to "neutralize" the borderlands to make sure the Senussi tribes there did not threaten the French hold on the territory south of 15° latitude.

As to the second requirement, could it really be suggested that France displayed sufficient *corpus occupandi*: what Huber was to describe in the *Palmas Island* case as: "the continuous and peaceful display of actual power in the contested region . . ." (*UNRIAA*, Vol. II, p. 857).

As regards continuity, we can accept that the notion varies with the nature of the territory: as Huber himself acknowledged (pp. 867-867), some degree of discontinuity can be tolerated when the territory is uninhabited or sparsely inhabited.

But in the present case, as regards the Tibesti, we have no continuity at all, from 1916 to 1929: the French were completely absent from this vast stretch of territory. Accordingly, it is impossible to see how France could have acquired any title to Tibesti by 1919, or at any time between 1916 and 1929. Even when France returned to Tibesti in 1929 its entire force consisted of 190 men (MC, Vol. III, p. 110). Imagine trying to occupy the whole of Tibesti, effectively, with 190 men!

As regards the requirement that the occupying State's powers should constitute a "peaceful" display of sovereignty, this requirement served to distinguish sharply a title acquired by occupation from a title acquired by conquest. The latter, as we shall see, was subject to very different rules, and applied in quite different circumstances. At least, that was so under the traditional law. But the traditional concept of a "peaceful" occupation had to be applied consistently with the evolving rules of general international law. As the Court noted in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, p. 33, para. 80), words or concepts require a contemporaneous interpretation consistent with the evolving law.

After 1919, therefore, when the League Covenant introduced the new rule prohibiting war as a means of territorial acquisition, it became necessary to interpret the traditional requirement of a "peaceful" occupation of a *terra nullius* so as to produce consistency with the new rule.

So for France, bound by the League Covenant, the requirement of "peaceful" occupation and the obligation to refrain from war coalesced. It was no longer open to France to argue that hostilities

used to subdue the inhabitants of *terra nullius* were lawful — because the Covenant prohibited only war against States — or, conversely, to argue that the customary law concept of "peaceful occupation" meant only "non-belligerent occupation" — so as to be satisfied provided the occupying State did not regard itself as a belligerent Power. The coalescing of the customary concept and the new treaty prohibition meant that *irrespective of the status of the inhabitants* the attempt to acquire sovereignty over their territory was illegal. In short, it meant that where a State used force to occupy territory, whether against a State or any people having title, that use of force precluded the acquisition of a valid title.

It must be clear that, in relation to Borkou and Ennedi, the French presence was not "peaceful". It could not be if the presence was entirely military. There would have been little point in maintaining a purely military control if France could have administered the territory peacefully with a more normal civil administration, plus a police force. But, of course, the French had to have a military presence. The resistance of the Senoussi tribes continued long after the end of the First World War, with attacks on French outposts being recorded into the 1930s (see CML, paras. 5.35-5.94).

The official French *Histoire Militaire* records a series of attacks, through 1915, 1916, 1917-1918, with Sheikh Erbeimi leading a sizeable force of 800 men against the French (see CML, Vol. 2, Exhibit 13, p. 467). This History, which is included in relevant part in Libya's written pleadings, is well worth reading for anyone disposed to give credence to the view that France had established a "peaceful" occupation. The French so-called "reprisals" continued to the north of Ennedi in 1926 and 1927. The widespread location of the fighting, in the period 1914-1927 can be seen on the map behind me (map No. 83). A report from the Governor-General of the AOF to the Minister of Colonies of July 1926 put the position as follows:

> "En resumé : le fait saillant qui ressort de cet ensemble d'événements, c'est l'autorité incontestable dont jouissent les chefs de la Senoussia, dans tous les territoires qui touchent aux frontières Nord-Est de la Colonie du Niger ou du Tchad, autorité qu'ils pourraient, le cas échéant, employer à grouper contre nous toutes les populations, fort bien armées, qui leur obéissent strictement, et celles des zones limitrophes, telles que le Tibesti qui échappent à notre surveillance directe." (RL, Vol. 3, Exhibit 11.4.)

The 1929 report of Captain Aubert put the position bluntly. Speaking of the region of Aouzou to which France had decided to return, he describes it as a:

> "région qui, depuis l'évacuation du Tibesti, n'a été visitée qu'une seule fois en 1923, dont les habitants n'ont jamais été soumis à la moindre action politique et d'où sont sortis, surtout en 1926 et 1927, de nombreux rezzous sur le Nord de l'Ennedi" (MC, Production 45).

But this resistance continued after the French return. A report in 1933 describes Modra as a "centre of rebellion" (LR, Vol. 3, Exhibits 7.3 and 7.4).

That, then, was the pattern. A small French force, located at two main points — Faya and Fada — with smaller outposts at Aïn-Galakka, Gouro and Ounianga (map No. 82). There was no intention to establish sovereignty, and no pretence at effectively occupying the whole territory. The reason why the hostilities are sporadic is simply that the tribes continued their normal life-styles as if the French did not exist and the "hit and run" tactics were the kind of guerrilla warfare that best suited the tribes. For the French did not trouble them greatly. They exercised no real administrative control, imposed no laws and, apparently, at this stage, no taxes. But their presence was never accepted, and resentment was occasionally demonstrated by a raid — that the French described as a "rezzou" — against one of their detachments, or a supply caravan. In reality, these attacks by the Senoussi tribes were a reflection of the deep resentment against this alien intrusion into their lands. The French Ministry of the Colonies, reporting to the French Minister for Foreign Affairs on 30 July 1930 — and referring to Tibesti, Ennedi and Borkou — stated quite openly that France had established no more than "une occupation rudimentaire" (MC, Vol. III, p. 177). Mr. President, a "rudimentary occupation" is not an *effective* occupation.

The notion of "effective occupation" has never been applied to this sort of nominal, superficial military presence: it has always conveyed the idea of government or administration of the territory.

The resolution of the Institut de Droit International, adopted at Lausanne in 1888, postulated two conditions for an effective occupation: (1) taking of possession, and (2) an official notification of this fact (Ann. de l'IDI (1888-9) 173, 201-4).

These conditions were never fulfilled. France never really attempted to fulfil them. Only in

1933-1934 do we get some evidence that France attempted, not very successfully, to take the people and start taking a census (RC, Vol. III, pp. 364-365). This suggests that France never really saw its military invasion of the borderlands as the peaceful occupation of a *terra nullius*. It was an attempt at military conquest, no different from the wars the French had fought in the areas further south, against the Senoussi forces defending Bir Alali in 1901 and 1902.

So the question we must now turn to is whether an alternative basis of French title is possible, namely occupation by conquest. But that, Mr. President, I think ought to wait until tomorrow.

The PRESIDENT: Very well, if you feel like that, yes, we'll continue tomorrow, Mr. Bowett. Thank you.

The Court rose at 1.10 p.m.

CR 93/20

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1993

Public sitting

held on Tuesday 22 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case Territorial Dispute
(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mardi 22 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial
(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Mr. Bowett.

Mr. BOWETT: Thank you, Sir.

Mr. President, Members of the Court, yesterday I examined Chad's hypothesis that France acquired title by 1919 on the basis of an effective peaceful occupation and I showed that on the facts that was not tenable. Now today, I turn to the only other possible alternative, "Title by Conquest".

(b) Title by Conquest

Chad does not assert that title was claimed by French conquest, nor did France ever make such a claim. So, from that point of view any discussion of this hypothesis may appear redundant.

One sees, immediately, why France chose not to rely on conquest. Such a hypothesis faced problems both under the traditional law and under the new law introduced in 1919 under the Covenant of the League of Nations.

Under international law a belligerent occupation did not confer title. The widely-dispersed meagre French presence would not have constituted a sufficient belligerent occupation, but, in any event, no sovereign title could be acquired by belligerent occupation. The acquisition of sovereignty could come about in only one of two ways. *Either*, through a cession of territory in a treaty of peace; or by *debellatio* — the end of hostilities brought about by the complete subjugation of the enemy — followed by formal annexation. Indeed, in the case of attempted acquisition of only part of the territory of a State, partial annexation led to acquisition of title only when expressly consented to by the defeated State.

Now it is not in dispute that, in the present case, neither happened. No treaty of peace was ever concluded, and no formal annexation occurred.

The question arises why France, having pursued a military campaign for over 20 years to subjugate the peoples of this area, and to claim sovereignty over their lands, chose not to follow the traditional methods of acquiring sovereignty, following a military victory.

We can only speculate as to the reasons but they may have been two. First, "annexation" following *debellatio* implied a pre-existing legal title — a title that was being displaced by the annexation, so that annexation proclaimed a new, but derivative title. Now, that is exactly what

France wished to avoid. For that would involve accepting the notion that a prior title had existed — whether in the local tribes, the Senoussi and the Ottoman Empire, or, after the Treaty of Ouchy, in Italy as successor to the Ottoman Empire. Second, once France had accepted the obligations of the League Covenant, it would be impossible for France to openly assert a title founded on conquest.

Thus, France had good reasons for avoiding any claim to title by conquest.

But — and this is an important qualification — a State cannot avoid certain binding rules, applicable in one context, by unilaterally qualifying the situation as belonging to a quite different context. In short, if the situation was truly one of conquest, it was not open to France to avoid the rules relating to conquest, simply by a unilateral characterization of the situation as one of a title and a boundary recognized by treaty. That is the characterization the Court must make. And if the Court finds no treaty boundary existed, and rejects *terra nullius*, we are inevitably forced to consider the legality of the only possible alternative basis for the French claim: that is, title by conquest.

Now let us apply the traditional requirements of title by conquest.

(i) The traditional requirements of title by conquest

It follows from my earlier discussion of the facts that France could not meet these requirements. Complete subjugation did *not* occur, for periodic hostilities continued until the 1930s; the records are full of references to these hostilities. I would invite the Court to examine the Exhibits produced with Libya's Reply, Volume 3, and especially Exhibits 7.3, 7.4 and 7.5. France never assumed the full control of the territory, or the exercise of powers of government over the territory and its people, for *debellatio* to occur. And certainly no formal act of annexation ever took place. So, even by reference to the traditional requirements France could not have acquired title by conquest.

(ii) The new limitation on conquest introduced by the Covenant to the League of Nations, 1919 and the Pact of Paris 1928

That these treaty obligations were binding on France from 1919 onwards, to the benefit of Italy, and arguably of the Senoussi, cannot be disputed. The obligations could not be avoided by simply pretending that, by 1919, France had already acquired title to the territory, and therefore despite its armed invasion no question of any breach of obligation towards either Italy or the Senoussi could arise.

Even if we place the most favourable construction on the French position, it would have to be conceded that France was aware that the matter of title was in dispute. The long series of negotiations between France and Italy, begun in June 1919 (see ML, para. 5.249) and continuing for the next 15 years, surely demonstrated that Italy claimed these territories. Whether or not France accepted the Italian claims, the existence of these claims precluded France from arguing that the obligation of Article X of the League Covenant did not apply because the territory belonged to France. That could not be assumed. That was clearly in dispute. And therefore France could not escape the prohibition of Article X by pretending that its own title was beyond dispute.

The conclusion must be that, given these obligations, France could not claim title by conquest. True, it did not do so; nor does Chad now claim on this basis. But what is important is to recognize that the obligations cannot be circumvented by relying on a theory of occupation. If the occupation was by force, and it occurred after 1919, it was equally prohibited however France, or now Chad, chose to describe it. Conquest or occupation makes no difference: if it was carried out by military force, it was illegal, and no lawful title could arise from it.

3. Chad's argument of "consolidation" of its title: the myth of acquiescence in the 1899-1919 "boundary"

In Chad's Memorial we find a whole Chapter — Chapter V to be exact — devoted to the theme that the 1899-1919 boundary was "consolidated" by the recognition of that line, or acquiescence in that line as a boundary, by other interested States during the period 1919-1955.

Chad's reliance on "consolidation" is rather telling. It is as if Chad accepts that its title to the territory, and the notion of an agreed boundary, is flawed: and Chad seeks to remedy those flaws by

postulating a general recognition of, or acquiescence in, its title and that specific boundary.

One thing at least is clear. If such a theory is to be advanced by Chad, then Chad must prove *knowledge* on the part of those said to have recognized or acquiesced in both title and boundary. For consolidation rests on what the Court describes in the *Anglo-Norwegian Fisheries* case as "the notoriety of the facts, the general toleration of the international community ..." (*I.C.J. Reports 1951*, p. 139). In short, consolidation, which is a form of consent, express, or implied, presumes knowledge of what was being consented to.

Now, as I shall presently show, there never was such consent, recognition or acquiescence: not by Italy, not by the Senoussi, not by Great Britain, not by the United Nations, and not by Libya. That can be shown as a fact.

Let us look at the various "actors" in turn, to see what their reactions really were.

(a) Italy

Italy protested vigorously against the 1919 Anglo-French Convention and the new line it proposed to substitute for the 1899 line. You cannot deduce from Italy's protests against the 1919 line an acceptance of the strict south-east line, the 1899 line, *as a boundary*. For Italy protested both against the change in the location of the line *and* the change in the status of the line. Italy was prepared to accept that the 1899 Convention had established a limit to any future French claims, but Italy had never recognized that line *as a boundary* (look, for example, at the Italian protest of 14 May 1930; MC III, Ann. 125). Indeed, Chad does not argue that Italy did accept the 1899 line as a boundary. Chad's theory of Italy's "acquiescence" relies on two pieces of evidence. The first is the abortive 1935 Laval-Mussolini Treaty, in which Chad purports to find an Italian recognition of the 1899-1919 line; and the second is the Jef-Jef incident in 1938.

(i) The 1935 Treaty

Now, as to the 1935 Treaty, since this has been covered in detail by Professor Condorelli, I need only repeat that *nothing* in the Italian position ever conceded *either* that France was sovereign over the borderlands, or that the boundary was clearly established on the 1899-1919 line, or that the

1935 Treaty contemplated a cession to Italy of French territory. Quite the reverse in fact.

And there is a curious aspect to this particular argument by Chad, which I must draw to the attention of the Court. The treaty was abortive, and Chad would be the first to deny that Libya had acquired any rights under the treaty. *A fortiori*, Libya could not acquire rights by virtue of the negotiations. Why, therefore, does Chad assume that Libya has acquired obligations by virtue of the negotiations? For that is what Chad is really arguing. The argument is essentially that, in the negotiations, Italy recognized French title (and the specific 1899-1919 boundary); and that Libya succeeded to Italy; and that Libya is therefore bound.

But, absent an estoppel, how could abortive negotiations create an obligation binding on a successor State? One can see that Italy's own position might be prejudiced by what Italy said during the negotiations. It is as if the two parties actually bargaining create rights *in personam*, as they might do in any negotiations for any kind of treaty.

But what binds a successor State is an actual boundary treaty, creating rights *in rem*. And if no treaty emerges, there is no reason to bind a successor State to a mere bargaining position, any more than one would bind a successor State to some form of political, or personal treaty, or to a negotiating position adopted for that purpose.

The relevance of the 1935 Treaty is not that it created rights or obligations, but rather that it evidences the recognition by both Parties that no previous boundary existed, and that Italian claims to the territory north of the 1935 line should be preferred.

(ii) The Jef-Jef incident

This, too, has been dealt with exhaustively by Professor Condorelli. I need only stress that Italy did *not* expressly recognize the 1899-1919 boundary. All it recognized was that the particular well lay in the zone which was to become Italian under the terms of the 1935 Agreement.

It really is rather extraordinary that Chad should try to build out of this one incident a "recognition" of the 1899-1919 line. You have to look at a State's conduct as a whole. Given Italy's protests against the 1919 line, given Italy's claims communicated to France in negotiations, it verges on the absurd to distort this one minor incident so as to imply acquiescence in the 1899-1919

boundary.

(b) The United Nations

Now let me deal with the United Nations. As regards Chad's thesis that a general recognition of the 1899-1919 boundary emerged from the discussions in the United Nations, in the years 1948 to 1952, this, too has been thoroughly examined by Sir Ian Sinclair. It is as perverse a reading of the record as can be imagined. It was precisely this southern boundary about which the United Nations was not clear, and not satisfied: and hence the call for negotiations between France and Libya, after independence.

(c) Libya's own conduct

Now as to Libya's own conduct, Chad relies on Libya's own conduct, post-independence, to show a Libyan recognition of the 1899-1919 boundary. But it is here that the requirement of knowledge is crucial. Libya could not acquiesce in legal rights about which Libya knew virtually nothing. And France quite deliberately avoided any discussion with Libya of the actual legal basis upon which a treaty-boundary might be established. Libya was shown no treaty texts, so maps, no records — nothing!

So, even if the Aouzou incident of 1955 supported Chad's interpretation that Libya then accepted that Aouzou lay in French territory — which, as Professor Cahier has shown, it did not — *without knowledge*, Libya could not be bound by any such statement.

(d) The attitudes of the Senoussi

It will be noted that Chad nowhere refers to any recognition of, or acquiescence in, French title — or to this particular boundary — by the indigenous Senoussi tribes. Their attitudes are apparently irrelevant.

If we were faced with a critical date of 1899, or even 1919, that might be acceptable. The right of self-determination was at that time embryonic — a precept of political good sense rather than a legal principle. But here the critical date is 1951, and, what is more, to provide consolidation of the French title Chad is quite prepared to look at events in 1955, and even 1960, the year of

Chad's independence.

Now by 1960 the right of self-determination was well-established and one would have thought that Chad might have sought to show that, as part of the "consolidation" of French title, there was acquiescence in that title by the indigenous peoples.

The total absence of any such evidence speaks for itself. Perhaps the most important element in any such consolidation — the consent of the people — is totally lacking.

Mr. President, that concludes what I have to say. I would be grateful if you would call on Professor Dolzer.

The PRESIDENT: Thank you very much, Professor Bowett. Mr. Dolzer.

Mr. DOLZER: As I take the floor for the first time I permit myself to say that I am honoured and that I am grateful that this task was entrusted to me.

Mr. President, Members of the Court, at the heart of the Libyan case lies the fact that the Ottoman Empire and the Senoussi peoples held title to the borderlands in 1912. I shall now discuss the factual and legal basis of this title.

The seven key events during this period, to which I shall refer, are the following:

First, the sporadic and ineffectual French military raids into the borderlands in the period 1906-1909;

Second, the Ottoman move into the borderlands starting in 1908 and ending in 1913;

Third, the *modus vivendi* reached between 1908 and 1913 under which French military forces remained south of a *de facto* line running roughly along 15° N latitude;

Fourth, preparations made for Ottoman-French negotiations to delimit the southern boundary of Tripolitania in 1911-1912;

Fifth, the French advance into the borderlands after the Ottoman withdrawal pursuant to the Treaty of Ouchy, with the objective of defeating the Senoussi and establishing a neutralized military northern front, but not to occupy and administer the region;

Sixth, the fierce resistance of the Senoussi peoples to the French invasion;

And finally, the official approach of Mr. Bonnel de Mezières, the French representative to the Head of the Senoussi, seeking to reach a French-Senoussi *modus vivendi*.

I should like to turn, first, to what was happening on the ground during the period after the signing of the 1899 Declaration up until the end of 1912, when the Treaty of Ouchy between Italy and the Ottoman Empire was signed.

The map now on the screen (Judge's folder, No. 18), discussed earlier by Mr. Sohier, shows the initial installation of direct Ottoman administration in the regions south of Tripoli. These first Ottoman posts were established at major oases along the trade routes, which the *Wali* of Tripoli controlled and in the interior of Tripolitania, following the Porte's replacement in 1835 of the Karamanli in Tripoli by a *Wali* sent from Istanbul.

Subsequently, the Ottomans began to move further southward:

The first incident of note concerned Djanet, in 1906. As can now be seen on the map (Map No. 46), this oasis is just south-west of Ghat, where an Ottoman garrison had been established in 1875. Word that the Ottomans had established a post at Djanet caused a great stir in Paris. For a time the occupation of the oasis was disputed between French forces and the Ottomans, creating at this point a potentially dangerous situation. As a result, a formal status quo agreement was reached in 1906 between France and the Ottoman Empire. In 1907, as troubles continued, the Governor-General of Algeria issued an order forbidding French troops to venture east of 6° E longitude. This line, adjusted from east of Paris to east of Greenwich, is now shown on the screen.

Additional Ottoman posts were established at Segeden, in 1906, and at Yat, in 1910.

Meanwhile, the French moves into Kaouar, to the west of the borderlands, caused the Porte, through his representative in Tripoli, to decide urgently to install posts throughout the borderlands. Following a French raid on Aïn Galakka in 1907, the *Derde*, or leader, of Toubou in Tibesti, visited the *Mudir* of Mourzouk asking for Ottoman assistance in the face of the French threat. As a result, the *Derde* was then appointed by the *Mudir* of Mourzouk as *Kaimakam*, or District Officer in charge of administration of this Ottoman district of Tibesti. An Ottoman administrative post was established at Bardaï in 1908. The Ottoman Empire at the time claimed that a *Kaimakam* of Tibesti

had first been appointed over 25 years ago, a claim disputed by the French. Two of the relevant French documents discussing this disputed claim are summarized in Volume 2 of Libya's Reply (Supplementary Annex Nos. 9.9 and 9.10, and annexed in Volume 3).

Next, a blockhouse was constructed in Bardaï and a substantial Ottoman garrison was installed. Two other Ottoman posts between Mourzouk and Bardaï were established — at Tedjerré and at Al Qatrum in 1909. Another blockhouse had been built near Zouar in Tibesti by 1911.

Now, it is important to emphasize that these actions taken by the Ottoman Empire were entirely different from the military actions of the French when they invaded the borderlands after 1912. The Porte was acting to defend the peoples and regions which he regarded — and publicly proclaimed — to be under his sovereignty. The Senoussi peoples of the region requested these Ottoman garrisons to occupy key posts in their lands. There was a pragmatic co-operation between the Senoussis and the Ottomans; their common objective was to preserve peace, to organize economic life and to defend their land whenever necessary.

Against this background, the Ottoman Empire continued to move its garrisons and administrative authority into the borderlands, now progressing generally south-eastward from Bardaï into Borkou and Ennedi. Ennedi became important to protect, for the French had defeated the Sultan of Oudaï, just to the south, and seized its capital Abéché in 1909. Ounianga, which the Senoussi firmly controlled, however, was not then threatened by the French advance, so no Ottoman post needed to be established there.

In 1909 the Ottomans began to construct a post at Yen near Aïn Galakka, which had become the bastion of the Senoussi forces after the fall of Bir Alali in 1902. A substantial force was subsequently garrisoned there. Then, in 1912, Ottoman posts were established at Faya, in Borkou, and at Baki, near Fada, in Ennedi — and finally at Oum Chalouba, just south of 16° N latitude. All these posts fell under the civil authority of the *Kaimakam* at Aïn Galakka.

Now, essentially, this was not a military operation. It was the installation of Ottoman civil authority in the area, supported by a military and gendarmerie contingent. There is no record of Ottoman forces, in large part, by the way, composed of gendarmes from Fezzan, there is no record

of them being engaged in any fighting — certainly not with the Senoussi peoples who welcomed them to the region. Nor with the French either, who had strict instructions not to advance into the borderlands. For the issue of sovereignty was to be settled by diplomatic means not by force, on the table, not on the battlefield. These were the explicit instructions given by the French Government to the French commanders in the field.

I turn next to the movement of French forces into the regions to the north and east of Lake Chad, but still south of the borderlands up through 1912 — leaving now aside French activities in Kaouar, which I have already touched upon. As mentioned earlier, the three-pronged French advance on Lake Chad culminated in 1900 when these forces converged on the shores of Lake Chad. French forces then embarked on three separate wars (Map No. 47).

Now, what did these French forces consist of? They were composed of a small number of French commissioned and non-commissioned officers; the rest were conscripted West Africans — I submit, hardly a force intended to effect a peaceful civil occupation of the territory.

In 1901, the French attacked the Senoussi *zawiya* at Bir Alali, whose location can be seen on the screen. It had been turned into a fortified *zawiya*, a bastion of the indigenous peoples' fight against the French assault. The first French attack, in 1901, when the French tried to take the *zawiya* by surprise, ended in disaster for the French. It was a clear defeat for the French forces, who had to withdraw, driven off by the combined forces of the Tuareg and Awlad Sulaiman tribes.

However, the French returned next year in 1902 with a much larger force and then overcame the fierce resistance of these Senoussi tribes. They destroyed now the *zawiya* including its mosque and its library.

Earlier, another war conducted by the French involved the defeat of Rabbah at the Battle of Kousseri in 1900. This opened the way to the *third* war launched against the Sultanate of Ouadaï, which later began in earnest in 1906. Abéché, the capital, was occupied by French forces in June 1909, and a new Sultan was now proclaimed by the French. However, sporadic fighting continued until 1912, when the French military took over.

Up to this point, French military activities had occurred well south of 15° N latitude: Abéché,

for example, lies to the south of 14° N latitude. However, there had been several forays north of there: Faya and Oum Chalouba in 1906; Aïn Galakka in 1907; Oum Chalouba again in 1909. But, one has to note that these incursions were harshly criticized at the senior French military level as being pointless, for they achieved no practical results (RL, Exhibit 9.5).

Mr. President, Chad's written pleadings describe the French invasion of the borderlands — the region north of course of 15° N latitude — as if it really began after 1900 when French forces moved into the regions north and east of Lake Chad and as if it was thereafter a continuous, evolving process. Chad treats the French forays north of 15° N latitude in 1906, 1907 and 1909 as if they represented the beginnings of French occupation of the borderlands and as a part of this ongoing continuous process. This is a total misrepresentation of what really took place. For from the time of the incidents at Djanet in 1906, which led to the appointment of a *Kaimakam* of Tibesti in Bardaï in 1908 and the construction of a blockhouse there and another further south near Zouar — from that time until the Treaty of Ouchy, — the French advance into the borderlands was halted on orders of the French Government in Paris. In consequence, the French had to find a way to adapt to this new situation. And that is precisely what happened.

Just as at Djanet, to the west of the borderlands, where a status quo agreement was reached in 1906 pending diplomatic settlement, so in the borderlands a *modus vivendi* was reached between France and the Ottoman Empire. From 1909, after the French had occupied Abéché in Ouadaï, until after the Treaty of Ouchy and in fact until mid-1913, the situation on the ground in the borderlands remained as now shown on the screen. French forces occupied posts at a series of oases stretching from Ziguei (near Bir Alali) on the west, to Ati in the centre, and on to Abéché and Arada, on the east. The most northerly posts were Ziguei, south of 15° N latitude, and Arada, almost exactly on this line of latitude. There they remained until instructions from Paris permitted them to move northward into the borderlands. But this move did not begin until after the start of 1913.

Thus, a *de facto* line, which is depicted now in general fashion on the map on the screen (Map No. 48), came into being. It was not a specific line such as the line of 6° E longitude which French forces in the region of Djanet were ordered not to go beyond. But it was observed by the French.

This *modus vivendi* or *arrangement passager*, which is so specifically referred to in French documents, is ignored in Chad's pleadings. It is camouflaged by Chad's presentation of the facts as if the French invasion of the borderlands was a continuous event following the destruction of the *zawiya* at Bir Alali. In reality it was not. Until mid-1913, French forces remained below 15° N latitude, except for those few ineffectual forays to the north.

I should like to focus now on the purpose and nature of the Ottoman presence in the borderlands after 1908.

The Ottoman move into the borderlands was the result of a deliberate policy of the Ottoman Empire to install direct control in areas over which the Caliph had claimed sovereignty in 1890 in order to halt the French military challenge;

This Ottoman move was carried out on behalf of the Caliph essentially by the *Wali* of Tripoli through the *Mudir* of Mourzouk;

The Ottoman move into the borderlands was continuous and quite rapidly achieved, given the nature of the terrain. It began with Bardaï in the north-west of the borderlands in 1908 and ended, in the south-east of the borderlands, with Baki to the west of Fada and with Oum Chalouba;

The entire Ottoman operation was under the civil control of *Kaimakams* appointed by the Caliph's representatives. The main posts, such as those at Bardaï and Aïn Galakka, were substantially manned, the military component being made up largely of Albanian troops and gendarmes from Fezzan. Several of these posts were garrisoned by as many as one hundred or more persons and the military contingent was equipped with canons. Modern forts and other defensive installations were constructed there.

The Ottomans, of course, joined forces, and worked in co-operation with the Senoussi tribes, whose strength at places such as Aïn Galakka was formidable.

The extension of Ottoman administration into the borderlands, of course, had been anticipated by the French authorities. As early as 1907, M. Gambon, the French Ambassador to London, had warned that, in order to prevent such a move by the Ottomans, there was an urgent need for France to at least send a mission into Tibesti and Borkou. But his proposal was not accepted, and the

events he feared then rapidly took place.

Mr. President, France attempted to describe the Ottoman presence in the borderlands as ephemeral or platonic. The evidence shows that this argument was self-serving and inaccurate. It was a substantial presence and it was continuous between 1908 and the end of 1912, and it was in direct implementation of a claim of sovereignty. It also was carried on at the invitation of and in conjunction with the Senoussi tribes and the Senoussi Order.

Now, of course, the Ottomans were not in the borderlands to fight. The reason was simple, they had nobody to fight against. The mere presence in the borderlands of these Ottoman posts brought to a halt the French advance on the clear instructions of the French Government. These instructions were criticized in the French press at the time and, indeed, they were a source of frustration for the military commanders in the field, but they were obeyed and that is what counts. From the French Minister of Colonies Messimy right up to the President of France himself it had been determined and decreed that the issue of the southern boundary of Tripolitania could be settled only at the conference table. All of these events are fully discussed in Libya's written pleadings (see, in particular, Part IV of the ML and Supp. Anns. 7-11 in Vol. 2 of the RL).

Together with the Senoussi and the Ottoman civil and military forces, the Ottomans completely controlled the borderlands between 1908 and 1913. All the essential components of governmental administration were there, whether measured by Islamic standards or by those of the Western European Powers. Order was maintained in the borderlands with the exception of military actions aimed at the threatening French forces, the so-called *rezzous*, although even these diminished with the arrival of the Ottomans, who attempted to co-operate with the French. The correspondence between Colonel Largeau and the Ottoman commander at Aïn Galakka discussed in the pleadings fully supports this conclusion.

There is not only indisputable evidence of the fact that the Ottomans had established their authority and control in the borderlands, but also that the French were aware of this fact. The French Minister of Colonies stated in a letter of 10 October 1911 that if reports which had reached him of the construction of a blockhouse near Zouar in Tibesti were true, this would, he said, be "une

manifestation indiscutable de l'occupation effective ottomane dans ces régions". It would be an indisputable manifestation of effective Ottoman occupation. Now, in fact, not only was there a blockhouse built at Zouar on the southern edge of the Tibesti massif, but three years earlier a very impressive blockhouse had been built in central Tibesti in Bardaï. This post was headed by a civilian *Kaimakam* and was soon occupied by a substantial garrison of over 100 gendarmes, soldiers and civilian officials.

It is incontestable that an *arrangement passager* or *modus vivendi* came into being between 1908 and 1913 along a *de facto* line, previously shown on the screen, that is generally along the line of 15° N latitude. I say these facts are incontestable because they are so fully established by the evidence. Now I have to add whether or not Chad contests them is not known, for to date, Chad's pleadings have simply ignored them. In any event, these status quo or *modus vivendi* agreements themselves attest to the effect produced by the Ottoman decision to install direct governmental authority in these regions.

It is now appropriate to turn to the preparations being made by the French Government and the Caliph to negotiate the delimitation of Tripolitania's southern boundary. Mr. President, I would suggest that this was one of the more telling events in the entire history of this territorial dispute. Reluctantly, the Caliph had gone ahead to delimit, in 1910, the Tripolitanian boundary with Tunisia, even though he did not recognize the French protectorate there. Now, a year later, France pressed to have the rest of the Tripolitanian boundary settled.

The reason for the French impatience and their desire to reach an arrangement there was, of course, that the French grew increasingly concerned as the Ottoman move into the borderlands continued. The French Government was convinced that the Caliph was stalling in setting a date in order to gain time to complete the Ottoman move into the borderlands and thus gain a tactical advantage in the negotiations. So the French Government took the public position that in the negotiations the French would simply refuse to consider Ottoman moves on the ground in the borderlands as a factor in settling the question.

Now as Libya has shown last week, the French Government at no time injected the element of

effectivités into the determination and negotiation of this boundary. As just mentioned, the French rejected *effectivités* as a factor in 1912 in respect to Ottoman moves that had taken place; later the French Government were never to raise the issue of French *effectivités* during the negotiations with Italy leading to the 1935 Treaty; and in the negotiations that led to the 1955 Treaty, the French Government insisted on a formula in Article 3 of the Treaty that relied only on international agreements *en vigeur* in 1951 and ruled out *effectivités*. This was in part due to France's fear of Libya's claims based on the presence of the Senoussi, on the strength at the time of the Ottomans and later on Italian occupation.

Returning now to the situation in 1911, the French pressed the Porte to agreed to a delimitation conference. The Porte ultimately agreed, and the conference was scheduled to take place in Tripoli at the end of 1911. Of course, it never took place due to other events. We do not know what role legal considerations would have played in such negotiations. What we do know is that the *vilayet* of Tripoli had privately proposed to Istanbul a substantial reduction in the hinterland claim as it had been set out in 1890.

This proposal appears now on the screen (Map No. 3). It is evident that this proposal reflected the events that had occurred since 1890. As the Court will now see, it was, in fact, not very different from Libya's claim in this case before this Court.

It is not without interest to pause here for a moment and to consider what legally relevant factors would have been discussed during the negotiations between the French and the Ottomans. Of course, Italy inherited these rights and claims that the Ottomans would have brought to the conference table. The French would presumably have pointed to the Anglo-French Declaration of 1899, knowing well that it was not opposable to the Ottomans. The Caliph's representatives would have been fully aware of that fact and also that, contrary to France's contention at the time, there had been no map attached to that Declaration. The Ottomans would have pointed to their claim of 1890, to the proposed reduction of their claim in 1911, and to the effective Ottoman presence in the borderlands, side-by-side with the Senoussi peoples, who welcomed them.

Now, on the whole the French had obviously become quite dissatisfied with the status quo.

They now sought to find a solution to the unresolved territorial dispute not only with the Ottomans but also with the Senoussi. In fact, the French Government recognized the need to attempt to negotiate not only with the Ottomans, but also with the Senoussi as early as 1911, even before invading the borderlands militarily. For the Minister of Colonies commissioned a senior French official, M. Bonnel de Mezières, to get in contact with the Senoussi Order and try to work out some sort of *modus vivendi*. Today, this person might be called something like a roving ambassador, and he had in hand a specific mandate from the French Minister of Colonies, a document in evidence in this case (ML, French Archives Ann., p. 250).

This interesting, and at times rather comic, episode is described and documented in Libya's pleadings (LM, Part IV; LR, Vol. 2, Supp. Ann. 10). It came to light that M. Bonnel de Mezières, in carrying out his mission, had undertaken to take up formally the question of the southern boundary of Tripolitania with the Head of the Senoussi, or at least that was what the latter believed, and with good reason, it must be said. The French emissary appeared to have agreed that on its eastern side the southern boundary of Tripolitania should be drawn at the latitude of Arada, which lies exactly on the line of 15° N latitude.

Now, the Head of the Senoussi appeared ready to agree to this part of the boundary, but in his formal reply to the proposal he set out the Senoussi demands, which included a demand that the French withdraw south of Bir Alali and, in addition, return the 700 books removed from its *zawiya* destroyed by the French in 1912. The western point of the line seemingly suggested by the Senoussi was Kousseri, to the south-east of Lake Chad on the Chari River where the French defeat of Rabbah had taken place in April 1900. Such a line between Arada (15° N) and Kousseri appears on the map on the screen. As is now being shown it is considerably to the south of the 1911 proposal of the vilayet of Tripoli, and quite different in that it would have included Kanem as part of the Tripolitanian hinterland, which the 1911 proposal would have excluded. The map also shows this line in comparison to the 1908-1912 *de facto* line separating the Ottomans and the French. It would have fallen well south of that line, as well.

Now, when word got out about this exchange of proposals, it caused a great stir in French

governmental circles in Paris and in the field. It came as a special shock to Colonel Largeau and M. Merlin, Governor-General of the AEF. The proposal of this French emissary concerning Aouzou was quickly denounced by the French Government on the grounds that he had exceeded his authority.

I have reminded the Court of this episode because of the light which it throws on the position that France took later, and Chad takes today. Just as the French agreed in 1911 to negotiate with the Ottoman Empire the southern boundary of Tripolitania, so in 1911 France approached the Head of the Senoussi to try to work out this kind of a *modus vivendi*. This was tantamount to recognition of the status of the Senoussi and the Senoussi peoples as holding claim to title to the territories which they inhabited.

Mr. President, while I was rapidly going over the various events of significance that transpired up until 1919, their relevance in the light of the legal principles set out earlier by Professor Crawford may have been obvious.

The central question is whether the Ottoman Empire succeeded in establishing effective governmental authority in the borderlands during the period from the start of the Ottoman move to Bardaï in 1908 and the final Ottoman withdrawal from Baku and Oum Chalouba around March 1913. The answer is clearly yes, for many reasons:

— The French recognized this fact, as the evidence discussed above shows;

— The coming into being of the *modus vivendi* was an acknowledgment of the establishment of Ottoman authority in the borderlands;

— The Ottoman posts were spread throughout the borderlands where control was necessary, excluding only Ouniaṅga, which was under firm Senoussi control;

— Ottoman authority was backed by the consent of the Senoussi peoples and the Senoussi Order and, hence, had behind it the entire forces of these peoples, which were considerable;

— The Ottoman installations in the borderlands were both civil and military, with the civil element in control and reporting back to the *Mudir* of Mourzouk and the *Wali* of Tripoli;

— Finally, all Senoussi peoples of the borderlands paid allegiance to the Caliph, and this was

expressly confirmed in many ways, as Mr. Maghur has brought out so clearly yesterday.

Thus, it is clear that the requirements for acquisition of title were fulfilled in the borderlands by the Ottoman Empire at the time. In fact, the intensity of the combined activities of the Ottomans and the Senoussi went well beyond what would have been necessary to ground a claim to title in these sparsely populated and desolate areas.

Compared to the subsequent French military invasion, evidence of effective exercise of governmental authority by the Ottoman Empire was manifest. The French military activities were not carried out with the intent to occupy the borderlands in any event *(animus occupandi)* on the part of the French. There was never any doubt as to the Ottoman intention to govern this region, and they had the support of the inhabitants — the Senoussi peoples. Thus, the Ottoman authority that was established was continuous and peaceful, unlike the French, who until the mid-1930s were engaged in fighting the Senoussi people living in the borderlands.

Finally, there was clearly no abandonment of title by the Ottomans and by the Senoussi peoples. In 1912, Italy inherited the Ottoman title under the Treaty of Ouchy. And the Senoussi peoples remained on their lands and continued their fight against the French military invasion.

I turn now to the developments after 1912. Professor Bowett has described the French military invasion of the borderlands starting in 1913. My purpose here is only to bring out the contrast between the nature of the Ottoman activities in the borderlands and those of the French, and thus also to underline the important differences between the French and the Ottoman activities. The following are the most striking differences and contrasts:

— The French invasion was purely military; its purpose was not to occupy the borderlands but to defeat the Senoussi, who the French saw as the source of all their difficulties in the borderlands but also in other parts of Africa;

— At no time before 1919 (and in fact not even by 1930) were French military forces in control of the borderlands; there was repeated armed conflict throughout the area;

— If French forces deployed in the borderlands were more numerous than the Ottoman forces who had left, it was only because the French were opposed by and had to fight against the Senoussi

peoples, while the establishment of direct Ottoman authority had been requested and accepted by these peoples and by the Senoussi leadership;

— The Senoussi peoples and the Senoussi Order leading them paid allegiance to the Caliph; they refused to enter into any deals with the French;

— In contrast to the Ottoman garrisons, all of them, by the way, Muslims, the French forces consisted of West Africans conscripted by the French and led by a small number of French officers. That was hardly an attempt to occupy the borderlands. Their mission was to destroy the centres of resistance so as to secure what the French always called the "Tchad utile", the regions lying south of the borderlands;

— The establishment of French posts was sparse and intermittent and it failed to include large parts of the northern borderlands including all of Tibesti. This is being demonstrated once again, now, on the screen by a map used earlier by Professor Bowett;

— Prior to 1919, Colonel Largeau and Governor-General Merlin proposed agreeing to allow the Senoussi to take over the French posts established at Gouro and at Ounianga Kebir, for they felt these posts could not be held; the French Government rejected the proposal in the light of prospective negotiations with the Italians.

Now, certainly nothing occurred prior to the end of 1919 that implied any abandonment of the rights of the Ottoman Empire. In its written pleadings, Chad, just like the French had done, claimed that the French routed the Senoussi, who withdrew to Koufra and, in effect, so the Chad and the French, abandoned the borderlands. But such a conclusion is wrong on many counts:

— The Senoussi Order moved its headquarters north again from Gouro to Koufra in 1902 after the destruction of Bir Alali and the death of the Great Senoussi. This was long before the French invasion of the borderlands in 1913. It was a strategic move by the Head of the Senoussi taken primarily for reasons of security but which, with the Italian invasion of Libya, permitted the Senoussi Order to bring to bear their leadership and direction of the tribes in the north opposing the Italian forces and of the tribes in the borderlands fighting the French;

— The resistance to the French invasion of the borderlands by the Senoussi was unremitting into

the early 1930s; the map which is No. 83 in your folders, already shown by Professor Bowett, depicts battles all over the borderlands during this period; this resistance continued to be guided and led by the Senoussi Order from Koufra;

— The French-Chadian thesis concerning the alleged abandonment of the borderlands by the Senoussi after 1902 fails to take account of another essential point: the inhabitants of the borderlands did not flee to the north with the arrival of the French forces; they remained on their lands and they fought the French advance; and it was the Senoussi and the Senoussi peoples who held title to these regions and bore allegiance to the Caliph. The territorial rights of the Senoussi peoples were, in turn, represented on the international level by the Caliph to whom they paid allegiance.

The first three of the boundary negotiations attempted — in 1911 with the Ottomans, the same year with the Senoussi, and in 1914 with Italy — failed to take place. The French Government finally did succeed in reaching a boundary settlement with Italy in 1935 — one certainly far more favourable to France than would have been achieved against the Ottoman Empire or the Senoussi in 1911. But that settlement did not result, as we have heard, in a conventional southern boundary of Libya due to the failure to exchange ratifications.

Thus, the titles held by the Senoussi peoples and the Ottoman Empire in 1912 remained intact. The Ottoman title was passed on to Italy. The title of the Senoussi peoples became represented at the international level by Italy. This title had been acknowledged by France when it attempted, but failed, to strike a deal with the Head of the Senoussi. Subsequently, both Italy and Great Britain were to enter into treaties with the Senoussi that implicitly recognized the title held by the Libyan peoples under their leadership.

Mr. President, Members of the Court, here, today, Libya's position is very much what the Ottoman position was on the eve of the scheduled 1911 negotiations with France when it represented at the international level the rights and titles of the indigenous Senoussi peoples. This was the position inherited by Italy in 1912 under the Treaty of Ouchy. And hence, it is not surprising at all that before this Court Libya's claim, as shown on the screen (Map No. 3), resembles so closely the

Ottoman position in 1911, reduced from 1819 as proposed by the *vilayet* of Tripoli.

This concludes my remarks, and I thank the President and the Members of the Court for their attention. If it is convenient, Mr. President, I would suggest that we now have the break and that you will later on call on Professor Condorelli.

The PRESIDENT: Thank you very much, Professor Dolzer. We will have our break now.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Mr. Condorelli.

M. CONDORELLI :

1. Introduction

Merci Monsieur le Président. Monsieur le Président, M. Cahier et moi-même avons eu l'honneur de vous entretenir la semaine dernière sur toute une série d'événements relevant de la période coloniale. Ces plaidoiries précédentes s'inscrivaient dans le contexte de la démonstration que la frontière entre la Libye et le Tchad n'a jamais été délimitée jusqu'à aujourd'hui et que par conséquent votre Cour est appelée à établir ex novo la délimitation en question. Bien entendu, je ne vais pas revenir sur cette démonstration. Nous en sommes maintenant à un stade ultérieur de l'argumentation libyenne : la Libye est en train de vous présenter son point de vue quant aux principes et critères juridiques dont il devrait être fait application afin de parvenir à une solution juste et équitable du présent différend.

La tâche dont je vais m'acquitter aujourd'hui est, justement, celle de concourir à la reconnaissance, à la recherche des principes et critères juridiques à appliquer, en prenant spécialement en considération ceux qui se rattachent plus directement à l'"héritage colonial".

Qu'il me soit permis de préciser dès le départ un point. Je viens de parler de principes et

critères "juridiques" à utiliser afin de parvenir à une solution "équitable" du différend. Ces propos évoquent certes l'équité, mais je tiens à souligner encore à ce sujet ce que M. Bowett a éloquemment illustré, dans sa plaidoirie de vendredi : il n'est pas question de faire appel ici à l'équité afin de demander à votre Cour de résoudre le présent différend *ex aequo et bono*, étant donné que l'accord-cadre de 1989 envisage un règlement judiciaire *secundum jus*, et non pas une solution basée sur l'article 38, paragraphe 2, de votre Statut. Cependant, ce constat n'exclut nullement le recours à l'*aequitas infra legem*, qui au contraire est toujours approprié, comme votre Cour l'a dit et répété tant à propos des délimitations maritimes que des délimitations terrestres.

Monsieur le Président, je m'excuse d'insister sur une notion aussi élémentaire. Mais c'est que le Tchad s'obstine à nier à tout prix un concept qui devrait pourtant relever de l'évidence même, lorsqu'il prétend que l'équité n'aurait aucun rôle à jouer dans les différends territoriaux, comme celui qui vous est soumis (contre-mémoire du Tchad, p. 36, par. 1.52 s.) : soit dit en passant, voilà une attitude étonnante, qui fait fi de votre jurisprudence, et qui amène à remarquer combien la Partie tchadienne semble redouter l'équité !

Ceci étant précisé, je voudrais maintenant en venir à la première indication qui se dégage de la période coloniale quant aux principes et critères juridiques applicables.

2. Le caractère maximal des revendications française et italienne en tant que points de départ dans la négociation

Monsieur le Président, Messieurs les juges, au lendemain même du traité d'Ouchy et de Lausanne de 1912 la France, après avoir reconnu sans réserves l'établissement de la souveraineté italienne sur la Libye, s'est empressée dès 1913-1914 de se préparer aux futures négociations avec le gouvernement italien en vue de parvenir à la délimitation des territoires coloniaux respectifs. Depuis le début, le choix français est fait : le moment venu, la France va s'asseoir à la table de négociation en présentant à l'Italie la thèse que nous connaissons très bien — que vous connaissez parfaitement, Messieurs les juges, puisqu'il s'agit en substance, à quelque nuance près, de la même thèse que soutient aujourd'hui devant vous la Partie tchadienne : tous les territoires au sud-ouest de la ligne figurant dans la carte prétendument annexée à la déclaration franco-anglaise de 1899 appartiennent

à la France, puisque l'Italie aurait "adhéré" à cette déclaration.

Il n'est bien entendu pas question ici de revenir sur le caractère artificiel et spécieux de cette thèse : ceci nous l'avons déjà démontré. Ce qu'il importe maintenant de souligner est que la thèse en question avait été très évidemment élaborée en tant que position de départ en vue de futures négociations : une position de départ indiscutablement excellente à cause du *fumus boni juris* que lui donnait le fait de se baser sur des arguments déduits, plus ou moins correctement à vrai dire, de traités liant les diverses puissances européennes.

Mais qui dit "position de départ" dit "thèse maximale", que l'on jette d'entrée de jeu sur le tapis vert des pourparlers diplomatiques afin de fixer les bornes à l'intérieur desquelles on cherchera ensuite, par rapprochements graduels de positions de part et d'autre, la solution de compromis, le *quid pro quo*, l'arrangement transactionnel.

Il convient de rappeler encore, pour compléter le tableau, que la thèse française de 1914 devait par la suite, dans les années vingt, subir une retouche; une retouche qui allait la rendre — si je peux m'exprimer ainsi — encore plus "maximale" qu'avant : ceci arrivera lorsque la France finira par soutenir que la ligne de 1899 (ou plutôt la ligne figurant dans la carte non annexée à la déclaration de 1899) s'identifierait en fait et en droit avec celle, pourtant bien différente, établie par l'accord franco-britannique de 1919; et que cette dernière ligne (celle de 1919 donc) engageait l'Italie parce que celle-ci l'avait acceptée en 1902, c'est-à-dire quelque 17 ans avant qu'elle ne fût tracée ! En somme, la thèse en question avait désormais perdu toute vraisemblance, mais ce n'était pas bien grave puisqu'il s'agissait encore une fois de la position diplomatique de départ en vue d'une future négociation.

Messieurs les juges, l'histoire des deux décennies de négociation entre la France et l'Italie prouve de la façon la plus efficace le bien-fondé de cette analyse. Pendant vingt ans, la France n'a pas cessé de faire état de sa disponibilité à la recherche d'une solution de compromis, en faisant des propositions diverses qui, toutes, je dis bien toutes, s'écartaient dans des mesures variables de la position de départ. Pour confirmer ce point, il suffit de rappeler ici comment le Quai d'Orsay évalua la délimitation résultant du traité Mussolini-Laval de 1935 (qui comportait notoirement la

reconnaissance comme Italiens de 114 000 km^2 de territoire par rapport à la position française de départ). La note interne du Quai d'Orsay du 24 janvier 1935 (mémoire du Tchad, p. 348, par. 10; mémoire de la Libye, p. 323, par. 5.322), admet en toutes lettres ceci :

> "La frontière qui séparera désormais la Libye de l'AOF et de l'AEF à l'est de Toummo reste très en-deçà des demandes présentées par l'Italie et même de certaines offres faites par la France depuis 1919."

Messieurs les juges, vous avez bien entendu : c'est le Quai d'Orsay qui jubile parce que la ligne de 1935, je le répète, "reste très en-deçà... de certaines offres faites par la France" ! La diplomatie française chante victoire, en constatant que l'Italie s'est contentée de très peu : elle s'est contentée de bien moins de ce que la France avait été prête à lui donner. Et le 25 mars 1935 le ministre français des affaires étrangères, Laval, adoptera devant le Sénat français le même ton triomphaliste, lorsqu'il aura l'outrecuidance d'exprimer ses regrets parce qu'en concluant le traité de Rome la France n'avait pas satisfait davantage les requêtes territoriales italiennes (*mémoire de la Libye*, p. 330) !

Ces faits démontrent, au-delà de tout doute possible, que la thèse française, que le Tchad reprend aujourd'hui à son compte, a toujours été une thèse maximale de départ pour la négociation. Je dois maintenant ajouter qu'il en a été bien entendu de même du côté italien. L'Italie aussi avait des thèses maximales, qui reprenaient les revendications ottomanes dans leur version extrême. Mais ce que la diplomatie italienne appela le *Programma massimo* (le programme maximum) n'était que la position de départ choisie afin d'entamer la négociation. Ensuite, en cours de route, des prétentions beaucoup plus mesurées, beaucoup plus réalistes pourraient être émises, et le furent effectivement : ce fut le cas, par exemple, du *Programma medio* (programme médium) du *Programma minimo* (du programme minimum), dont le professeur Bowett parlera tout à l'heure. Je voudrais faire remarquer ici, en passant, que la demande que la Libye présente à votre Cour se rapproche beaucoup de la revendication minimale italienne, et non pas du *Programme massimo* italien; alors que la prétention tchadienne est identique à ce que vous me permettrez d'appeler le *Programma massimo* de la France.

Messieurs les juges, en énonçant d'entrée de jeu des prétentions maximales et en affrontant la

discussion à partir de là, la France et l'Italie ont fait ce qu'imposent l'art de la négociation et le droit international. Tout négociateur sait bien, en effet, que l'issue d'une vraie, d'une bonne négociation ne saurait jamais être représentée par l'accueil intégral de la requête d'une partie et le rejet tout aussi intégral de la prétention de l'autre : en l'espèce, la France et l'Italie n'ont pas fait exception à cette règle, comme le montre le fait qu'elles se sont toujours montrées disponibles à envisager des "concessions" à la partie adverse.

Ce faisant, la France et l'Italie respectaient un principe bien établi de droit international. Celui d'après lequel, dans tous les cas où une négociation est nécessaire pour parvenir au règlement d'un différend, les parties sont soumises à une véritable obligation de "se comporter de telle manière que la négociation ait un sens, ce qui n'est pas le cas lorsque l'une d'elles insiste sur sa propre position sans envisager aucune modification". C'est votre Cour qui s'est exprimée ainsi dans l'affaire du *Plateau continental de la mer du Nord*, dans l'arrêt du 20 février 1969, par. 85, *a)*.

Naturellement, cette obligation qui, à l'époque, pesait sur la France et l'Italie, pèse aujourd'hui, depuis leur indépendance, sur le Tchad et sur la Libye. Les Parties n'ayant pas pu régler par voie d'accord leur différend, et ayant accepté d'en remettre la solution à votre Cour, c'est à vous qu'il appartient maintenant de trouver un règlement juste et équitable qui prenne en considération tous les éléments juridiques pertinents. Parmi lesquels il faut compter l'obligation des Parties de ne pas prétendre que soit conforme à la justice le règlement d'un *différend* territorial comportant l'acceptation intégrale de la position que l'une des Parties avait elle-même clairement définie comme un simple point de départ en vue de négociations futures.

Monsieur le Président, Messieurs les juges, votre Cour cite volontiers dans ses arrêts un *obiter dictum* célèbre qui figure dans une ordonnance du 19 août 1929 de sa devancière, la Cour permanente de Justice internationale : "le règlement judiciaire des conflits internationaux, en vue duquel la Cour est instituée, n'est qu'un succédané au règlement direct et amiable de ces conflits entre les Parties". C'est l'affaire des *Zones franches, C.P.J.I. série A n° 22*, p. 13), donc l'ordonnance de 1929. Je pense qu'il est particulièrement approprié ici de rappeler cette notion fondamentale, s'agissant de mettre en évidence que la mission de la Cour est de faire au moyen d'un

jugement ce que les parties concernées n'ont pas été en mesure de faire par voie d'accord : établir une délimitation territoriale sur la base de tous les droits et de toutes les obligations de droit international qui pèsent sur les parties, y compris celle que je viens d'évoquer.

3. La délimitation non entrée en vigueur de 1935

Monsieur le Président, j'en viens maintenant au traité de Rome de 1935, par lequel la France et l'Italie avaient délimité la frontière entre la Libye et les territoires de l'AOF et de l'AEF à l'est de Toummo. Le traité, on le sait, n'est pas entré formellement en vigueur, puisque l'Italie refusa de procéder à l'échange des instruments de ratification. Mais ceci ne lui enlève pas le rôle d'élément essentiel dans l'affaire qui vous est soumise.

Comment pourrait-il en aller autrement, d'ailleurs ? Le traité de Rome est en effet le seul et unique acte international qui, pendant toute l'histoire séculaire de ce différend, a eu le but affiché de tracer une ligne délimitant la frontière dans la zone en question et qui ait réellement accompli cette tâche.

Comment pourrait-il en aller autrement, d'autre part, puisqu'avant ce traité aucun, je dis bien aucun, des instruments sur lesquels le Tchad base sa prétention n'avait été négocié et conclu par les Etats exerçant effectivement leur souveraineté, de part et d'autre, sur le territoire à délimiter ?

Bien entendu, il n'est pas question de rouvrir ici le dossier des accords Mussolini-Laval : il s'agit exclusivement maintenant de voir dans quelle mesure les accords de Rome de 1935 suggèrent des indications de caractère juridique dont la Cour pourrait tenir compte afin de s'acquitter de sa mission.

Pour procéder à cette analyse, il convient que je revienne sur un point dont le professeur Bowett a parlé vendredi dernier. Dans les deux cas les plus récents de délimitations terrestres qui vous ont été soumis deux Chambres de votre Cour ont insisté de la façon la plus claire et la plus explicite qui soit sur le rôle éminent qu'il faut attribuer à l'*aequitas infra legem* dans le règlement des différends de ce genre. Or, il est important de souligner ce qui a amené la Cour à faire appel à l'*aequitas infra legem* et ce qu'elle a appliqué à ce titre dans les deux affaires : il s'agissait de tirer des indications précieuses, justement d'accords de délimitation qui n'avaient pas été ratifiés.

Dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* (l'arrêt de 1986), il a été question d'un procès verbal du 15 janvier 1965 qui contenait des indications précises concernant la manière de délimiter une certaine portion de la zone frontalière, mais qui n'avait pas été approuvé par la suite par les autorités compétentes des deux pays, de sorte qu'il n'avait pas acquis, comme le dit la Chambre (par. 147), "la force obligatoire d'une convention". Malgré cela, l'arrêt de 1986 a constaté que l'équité *infra legem* imposait en l'espèce de s'en tenir à la solution prévue par l'accord non ratifié, au vu de ce que la Chambre appelle "les circonstances dans lesquelles cet accord est intervenu" (par. 149).

Dans l'arrêt du 11 septembre 1992, à deux reprises la Chambre de votre Cour a eu recours à un raisonnement similaire. Ainsi, la Chambre a estimé que la manière appropriée de prendre appui sur l'*aequitas infra legem*, dans un certain secteur, était de faire appel à ce qu'elle dénomme "la délimitation non ratifiée de 1869". La Chambre fait ici allusion à certaines négociations qui avaient eu lieu entre les deux Etats à ladite époque et qui avaient débouché sur un tracé de frontière, sans qu'un accord en bonne et due forme n'ait été conclu par la suite. Or, c'est justement le tracé de 1869 qui apparaît au juge comme "une solution raisonnable et équitable", étant donné que rien, dans les négociations qui avaient amené à le retenir, ne suggérait qu'"il y ait eu un désaccord fondamental entre les Parties au sujet de cette ligne".

Toujours dans le même arrêt de 1992, la Chambre utilise de nouveau, pour un autre secteur, un accord *ad referendum* de 1935 arrêté à la suite de négociations entre El Salvador et le Honduras, mais que les gouvernements respectifs n'avaient pas ratifié ultérieurement. Ici aussi la Chambre a accordé de l'importance au constat que les parties avaient omis les ratifications pour des raisons n'impliquant pas la contestation de la ligne en question (par. 100 et suiv.).

Messieurs les juges, votre jurisprudence incite, me semble-t-il, à raisonner d'une façon similaire au sujet des accords de Rome de 1935. Certes, si le traité de Rome de 1935 était entré en vigueur, il serait parfaitement superflu de se demander maintenant si le tracé de la frontière qu'il prévoit était censé modifier un tracé précédent, ou bien déterminer ce tracé pour la toute première fois.

Mais puisque ledit traité n'est pas entré en vigueur et puisqu'aucun autre instrument international précédent ou postérieur n'a délimité la frontière, il devient alors essentiel, conformément à votre jurisprudence, de poser deux questions précises. La première est dans quelles circonstances la délimitation de 1935 a-t-elle été convenue entre les parties et quel but les parties voulaient-elles réaliser par ce biais ? La deuxième question est pourquoi, par la suite, les parties n'ont pas voulu que le traité entre formellement en vigueur ?

Quant à la première question, la réponse est simple, à la lumière de tous les éléments que nous connaissons : la France et l'Italie ont officiellement reconnu qu'aucune délimitation n'avait jamais été établie auparavant. Le traité de 1935 délimitait donc la frontière pour la toute première fois dans une région contestée et reconnaissait ainsi l'appartenance des territoires, de part et d'autre de la ligne qu'il traçait, à la France et à l'Italie respectivement.

Reste la deuxième question : pourquoi le traité de Rome n'est pas entré en vigueur ? Pourquoi les ratifications n'ont pas été échangées finalement, et ceci malgré les fanfares qui en avaient accompagné la conclusion, malgré les ardents discours des deux gouvernements et l'accueil enthousiaste que lui avaient réservé les deux Parlements, lesquels accordèrent l'autorisation à la ratification à l'unanimité, pour ce qui est du Parlement italien et du Sénat français, et avec une majorité écrasante de 555 contre 9 pour ce qui est de la chambre des députés française ? La réponse est facile. Ce traité représentait une victoire éclatante pour la diplomatie française, qui avait sacrifié très peu de chose par rapport à sa position maximale de départ : Mussolini s'était contenté, comme on le dit à l'époque, de quelques arpents de sable. C'est pour cela que la France multiplia pendant quelque quatre ans les démarches afin de convaincre l'Italie de procéder à l'échange des ratifications.

Mais l'effort fut vain, et on en comprend bien la raison. En 1935 Mussolini, en effet, avait été sévèrement critiqué par les milieux coloniaux italiens pour avoir bradé, comme on le dit à l'époque, le territoire libyen (comme on le dit "sottovoce") : c'est le Tchad lui-même d'ailleurs qui a démontré cela d'une façon fort éloquente dans son mémoire (p. 373). Mais on sait parfaitement, et le Tchad le reconnaît sans difficulté, pourquoi le Gouvernement italien avait accepté de sacrifier à un tel point ses revendications territoriales traditionnelles. Le sacrifice territorial que l'Italie aurait enduré lui

permettait d'obtenir un *quid pro quo* très prisé aux yeux du gouvernement fasciste : en retour, l'Italie recevait discrètement le *nihil obstat* de la France, voire sa bienveillante bénédiction pour l'imminente agression à l'Ethiopie.

Par la suite, l'Italie considéra que la France avait pris, au regard du dossier éthiopien (spécialement à la Société des Nations), une attitude non conforme aux engagements de complicité (ou tout au moins de connivence) qu'elle avait assumés. D'où la riposte : l'Italie laisserait tomber les accords de 1935 pour sanctionner l'attitude peu amicale de la France à son égard, et pour marquer que d'autres relations (celles avec le III[e] Reich) seraient désormais privilégiées.

Messieurs les juges, voilà pourquoi le traité de Rome n'est pas entré en vigueur. La France y était très attachée, le considérant comme nettement avantageux pour elle; tellement avantageux que même après que les intentions italiennes lui aient été officiellement notifiées, elle fera savoir le 29 décembre 1938 — quelque quatre ans après la signature du traité — à la Grande-Bretagne que le Gouvernement français "entend laisser subsister la base juridique de l'entente conclue en 1935 et reste prêt, en dépit de la tension actuelle, à exécuter intégralement les accords" (mémoire de la Libye, pièce 58). Par contre, du côté italien, les accords en question étaient ressentis comme comportant un sacrifice territorial injustifié, qu'à défaut de contreparties appropriées il ne convenait pas de supporter.

Monsieur le Président, Messieurs les juges, il me semble que toutes les conditions sont réunies, d'après votre jurisprudence, pour que des accords de Rome soient tirées d'importantes indications quant à la délimitation que vous devez effectuer.

Des accords de Rome se dégage, en particulier, une indication évidente et à mon sens univoque : au minimum, les territoires situés au nord de la ligne de 1935 doivent être reconnus comme appartenant incontestablement à la Libye. Ces accords suggèrent également (mais sans donner ici des indications précises) que certains des territoires au sud de cette ligne doivent aussi être considérés comme étant dans la même situation juridique.

4. Héritage colonial et équité

Monsieur le Président, j'en viens maintenant à une dernière série de considérations qui sont

suggérées par une analyse qui m'a amené à explorer diverses facettes de l'influence que la période coloniale exerce quant au règlement du présent différend. C'est une évidence que l'héritage colonial pèse très lourdement sur tout contentieux territorial entre des Etats issus de la décolonisation. Et la présente affaire ne fait pas exception à la règle.

Cependant, si l'on jette un regard d'ensemble à l'argumentation que le Tchad propose à votre Cour, on est frappé par l'impression que le poids de l'héritage colonial n'est ni également ni équitablement réparti entre le Tchad et la Libye : on dirait que l'Italie a transmis à la Libye un legs qui ne se compose que d'obligations et de servitudes en faveur du Tchad, alors que la France n'a transféré au Tchad que des droits et des avantages par rapport à la Libye. On dirait, en somme, que la Libye a reçu exclusivement le passif de l'héritage et le Tchad seulement l'actif.

Pour le Tchad, en effet, cette affaire se résume, finalement, en une série de décisions que la France aurait adoptées, en les négociant le cas échéant avec un Etat tiers, la Grande-Bretagne, face auxquelles l'Italie se serait inclinée, ou n'aurait pas protesté, ou aurait acquiescé, en renonçant par là — mais sans jamais en énoncer explicitement l'intention — aux droits qu'elle aurait pu faire valoir. Et la Libye se trouverait de ce fait — passez-moi l'expression — "coincée", prise au piège, devant supporter les conséquences de cet ensemble d'agissements. Le Tchad, en revanche, n'aurait pas à subir le moindre préjudice pour ce que la France a pu faire ou ne pas faire pendant la période coloniale.

Ainsi, par exemple, en 1902 l'Italie aurait cru à la contre-vérité qu'une carte était annexée à la déclaration franco-anglaise de 1899, et la Libye serait aujourd'hui liée par la bévue que l'Italie aurait commise il y a 90 ans, alors que le Tchad pourrait tranquillement tirer tout avantage du mauvais tour qu'avait joué la France à l'époque. Ainsi encore, la Libye devrait payer aujourd'hui le prix du fait qu'au début du siècle l'Italie se serait conduite de façon à faire croire qu'elle renonçait par anticipation à des droits et titres qu'elle n'avait pas encore et qu'elle n'aurait acquis que quelque dix ans plus tard, lorsqu'il y aurait eu la succession à la Porte concernant le territoire libyen; par contre, le Tchad ne serait d'aucune façon engagé par la reconnaissance parfaitement explicite, faite par la France en 1935, d'après laquelle aucune frontière n'avait jamais été déterminée à l'est de Toummo.

Ainsi encore, la Libye devrait subir les implications d'arrangements d'une lointaine époque qui poursuivaient des buts autres que celui de l'établissement des frontières et qui avaient été conclus derrière le dos de l'Etat qui exerçait sa souveraineté sur le territoire libyen : c'est-à-dire, derrière le dos de la Turquie en 1899 et en 1902 et derrière le dos de l'Italie en 1919.

Voilà des exemples déjà assez impressionnants de l'approche fondamentalement déséquilibrée dont le Tchad se fait le champion. Mais il y a bien plus : il y a deux étapes de l'argumentation tchadienne qui représentent — qu'il me soit permis de le dire — de véritables chefs-d'oeuvre du genre.

La première est celle qui concerne l'accord franco-anglais de 1919, qui "interprète" la déclaration franco-anglaise de 1899, en déplaçant très nettement vers le nord la ligne de sud-est qui était prévue dans cette dernière. M. Cahier vous a parlé des protestations fermes et continues que l'Italie adressa tant à la France qu'à la Grande-Bretagne à ce sujet, dès qu'elle eut connaissance de ce que les deux Etats avaient secrètement tramé entre eux. En bon droit, de telles protestations comportent que l'accord de 1919 — *res inter alios* — ne pouvait produire aucun effet pour l'Italie et ne peut en produire aujourd'hui aucun pour la Libye, Etat successeur de l'Italie. Mais, comme vous le savez, la thèse du Tchad est toute autre : pour le Tchad, ce sont les protestations italiennes qui ne valaient rien et qui n'ont produit aucun effet, pour la simple raison que l'Italie, d'après le Tchad, n'avait aucun titre juridique pour protester.

Même en laissant de côté les remarques critiques que la Libye vous a déjà présentées, il faut avouer que cette thèse laisse vraiment bouche bée, parce qu'elle fait penser à une sorte de double saut périlleux : le Tchad voudrait vous faire croire qu'en 1919, lorsqu'elle était souveraine en Libye, l'Italie n'était pas juridiquement habilitée à protester contre le déplacement de la ligne de 1899; alors qu'en 1902, quelque dix ans avant qu'elle ne foulât le sol libyen, l'Italie aurait eu d'après le Tchad tous les titres juridiques pour accepter la même ligne ! En somme, l'Italie avait le titre pour dire oui, mais pas le titre pour dire non ! Ceci avec la conséquence remarquable que voici : la Libye serait aujourd'hui liée par l'acceptation italienne de 1902, mais ne pourrait pas se prévaloir du bénéfice des protestations italiennes des années vingt et trente !

J'en viens, pour terminer, à une deuxième étape, tout aussi surprenante, du raisonnement tchadien. Il s'agit ici de la question de savoir si la Libye peut ou non invoquer à son avantage l'article 13 de l'accord de Londres de 1915, qui imposait à la France l'obligation d'accepter un règlement favorable à l'Italie des questions pendantes concernant les frontières libyennes : une obligation dont la France ne s'est pas acquittée complètement, comme le Tchad le reconnaît sans difficulté. Le Tchad, on le sait, répond par la négative. Son argumentation est que le traité de paix de 1947 a balayé ce qui restait des droits que l'Italie pouvait tirer de l'accord de Londres : ceci du fait même que l'Italie — en vertu de l'article 23 du traité de paix — perdit ses colonies africaines, y compris la Libye, avec tous les droits et titres y relatifs. Ces droits et titre — soutient le Tchad — furent transférés aux quatre puissances, dont la France et la Grande-Bretagne. D'après le Tchad, la conséquence en est que les droits que l'Italie pouvait tirer de l'accord de Londres envers ces puissances prirent fin puisque "à l'évidence, on ne peut pas être titulaire en même temps d'un droit et de l'obligation correspondante" (réplique du Tchad, p. 85).

Messieurs les juges, si je rappelle ce dossier, qui vous a été déjà illustré, c'est pour une seule raison : je voudrais vous faire noter que d'après le Tchad le traité de paix aurait (semble-t-il) fait *tabula rasa* exclusivement des droits que l'Italie avait envers la France au sujet du territoire libyen : de ce fait, la Libye ne pourrait pas s'en prévaloir aujourd'hui contre le Tchad. Par contre, les obligations que l'Italie avait contractées à l'avantage de la France, auraient miraculeusement survécu, de sorte qu'aucun obstacle n'empêche aujourd'hui le Tchad de les invoquer devant votre Cour. Et dans cette mouvance la réplique tchadienne (p. 92) pousse l'audace jusqu'au point de réprimander sévèrement la Libye parce qu'elle ose invoquer à son avantage les dispositions d'un traité entre les puissances coloniales qui "en prévoyant ... le 'charcutage' de l'Afrique, porte la marque du cynisme impérialiste le plus intolérable" (c'est le Tchad qui parle). Comme si les instruments franco-anglais de 1899 et de 1919 n'étaient pas les fils du même cynisme impérialiste, comme s'ils ne portaient pas la marque de la même approche colonialiste !

Monsieur le Président, Messieurs les juges, je pense que je n'ai pas besoin d'ajouter grand chose pour dénoncer le caractère fondamentalement inéquitable de l'approche tchadienne concernant

la répartition du legs colonial entre les Parties au présent différend. Votre Cour saura faire oeuvre de justice en adoptant une solution conforme non seulement au droit, mais à l'équité aussi; et l'équité demande — la Libye en est convaincue — qu'un équilibre satisfaisant soit trouvé quant au poids de l'héritage colonial que la Libye et le Tchad sont appelés à porter.

5. La prise en compte des aspirations et du bien-être des populations concernées par la délimitation

Monsieur le Président, je viens de développer trois arguments qui se basent sur les faits et gestes des puissances coloniales avant l'indépendance de la Libye et du Tchad. Il est grand temps maintenant de parler d'arguments d'un ordre différent, portant sur la dimension humaine de l'affaire dont votre Cour est saisie. La période coloniale voit apparaître des principes juridiques, relatifs aux aspirations et au bien-être des populations concernées, qu'il est nécessaire de prendre en compte maintenant afin de parvenir au juste règlement du présent différend.

Bien sûr, il faut garder constamment à l'esprit ce qu'a souligné l'arrêt du 22 décembre 1986 de votre Chambre, paragraphe 149, qui a été repris par celui du 11 septembre dernier, paragraphe 58, je me réfère à l'idée suivant laquelle : "rien n'autorise un recours à la notion d'équité pour modifier une frontière établie".

Mais nous ne sommes pas dans ce cas de figure : la conviction de la Libye est que les arguments relatifs à la dimension humaine ont une importance toute particulière dans la présente affaire justement parce qu'aucune frontière n'a jamais été tracée dans la région en question, ni pendant ni après l'époque coloniale. La Cour devant établir une telle frontière pour la première fois, il est naturel que la dimension humaine soit l'objet d'une attention spéciale de sa part. Or, cette attention spéciale, en l'espèce, n'est pas requise seulement par l'*equitas infra legem*, mais aussi par les règles juridiques applicables.

C'est que pendant la période italienne voient le jour des normes internationales qui consacrent les intérêts légitimes des peuples de la région, qui attribuent à ces peuples des véritables droits internationalement garantis et qui obligent spécifiquement à effectuer la délimitation en prenant compte les intérêts des peuples concernés. De façon emblématique, ces normes se situent au tout début et à la toute fin de la période dont je suis en train de m'occuper.

Les normes du début sont celles du traité d'Ouchy de 1912, dont j'ai déjà parlé dans ma première plaidoirie. Je ne reviendrai sur ce sujet qu'un seul instant, pour rappeler que le traité en question transmettait à l'Italie le territoire libyen en faisant peser sur cet Etat l'obligation de respecter l'"autonomie" des populations concernées, ce qui impliquait le droit de celles-ci d'exercer librement leur culte ainsi que le droit de participer à la gestion de la chose publique.

Ce régime impliquait donc la reconnaissance internationale de l'unité, de l'identité et des droits du peuple libyen : le pouvoir colonial italien était par conséquent soumis à l'obligation internationale de gérer la Libye en respectant ces principes.

Or, il me semble évident que cette obligation devait nécessairement s'appliquer aussi à la gestion du dossier frontalier. Autrement dit, la négociation en matière de délimitation devait être menée du côté italien, non seulement dans l'exercice des droits dont l'Italie avait hérités de son prédécesseur, mais aussi dans le respect des obligations que l'Italie avait contractées au sujet de la Libye, y compris celle relative à la préservation de l'unité, de l'identité et de l'autonomie du peuple libyen.

Monsieur le Président, je n'ai pas besoin de rappeler ici qu'après la première guerre contre la Senoussia (1911-1917), l'Italie commença par essayer de respecter ses obligations à l'égard du peuple libyen et ceci en concluant toute une série d'accords avec la Senoussia, qui en fait luttait pour l'indépendance. Je passerai également sur le tournant de 1923, qui représenta un changement radical dans l'attitude du Gouvernement italien. Celui-ci dénonça tous les accords avec la Senoussia et lança la grande campagne militaire, c'est-à-dire la deuxième guerre entre l'Italie et la Senoussia (1923-1932), qui se termina par l'écrasement de la lutte anti-coloniale, symbolisé tragiquement par le procès et la pendaison du héros légendaire et leader de la lutte de libération libyenne contre l'Italie, le cheikh Senussi Omar el Mukhtar, dont vous avez déjà entendu parler, et qui avait été investi par la Senoussia de la charge de diriger toute la lutte armée contre les forces italiennes. Il est évident que le régime fasciste italien s'était ainsi rendu responsable de la violation des obligations internationales qui pesaient sur lui à l'égard du peuple libyen. Mais il faut souligner maintenant que, malgré tout, ces obligations sont restées en vigueur pendant toute l'époque coloniale, le traité de Lausanne de 1923 ayant aboli les droits et privilèges que la Turquie avait conservés en Libye en vertu du traité

d'Ouchy, et non pas les droits que ce traité garantissait au peuple libyen.

Monsieur le Président, Messieurs les juges, si j'évoque maintenant ces obligations internationales à l'égard du peuple libyen que l'Italie aurait dû prendre en compte dans la gestion du dossier frontalier, ce n'est pas pour proposer à la Cour d'appliquer maintenant le traité d'Ouchy. Ceci d'autant plus que les obligations prévues à l'avantage du peuple libyen pesaient sur l'Italie, et non pas sur la France (ou, encore moins, sur le Tchad aujourd'hui). Mais mon but est autre : mon but est de mettre en lumière la relation de continuité qui existe à ce sujet entre le traité d'Ouchy de 1912 et le traité de paix de 1947, c'est-à-dire l'instrument international qui clôt cette fois-ci la période coloniale italienne et qui s'occupe, comme on le sait, de la Libye ainsi que du problème de ses frontières. Or, à la différence du traité d'Ouchy, le traité de paix de 1947 a créé toutes sortes d'obligations non seulement pour l'Italie, mais aussi pour la France, qui en est l'une des parties; et dans la mesure où des dispositions du traité de paix portent sur la question qui forme l'objet du présent différend territorial, la Libye et le Tchad en sont incontestablement liés au titre d'Etats successeurs.

Je voudrais rappeler l'aspect pertinent de l'annexe XI du traité de paix. C'est à la décision unanime des quatre puissances que le traité de paix confiait la mission de déterminer le sort définitif de la Libye, mais aussi de procéder aux "ajustements appropriés — c'est la terminologie utilisée — de ses frontières, et ceci "en tenant compte des aspirations et du bien-être des habitants, ainsi que des exigences de la paix et de la sécurité". C'est la formule qu'on trouve dans le traité de paix. Pour ce faire, les quatre puissances avaient un an de temps, après quoi la tâche serait transmise à l'Assemblée générale. C'est ce qui arriva effectivement, à cause du désaccord entre les puissances, provoqué notamment par les aspirations de la France d'annexer au territoire de ses colonies environnantes des portions substantielles du territoire libyen.

L'Assemblée générale cependant décida de ne pas envisager des modifications des frontières, comme sir Ian Sinclair l'a illustré : elle considéra que sa mission était de s'occuper exclusivement de la délimitation de ces seules frontières qui n'avaient pas été déjà fixées par des accords internationaux. Or, dans la résolution 289 (IV) de 1949, section C, il est explicitement établi aux

points 1 et 2 du préambule que toute l'opération est placée sous l'emprise des principes proclamés dans le traité de paix, y compris, en particulier — cela est répété explicitement — celui relatif à la prise en compte des aspirations et du bien-être des populations concernées. Ensuite, en 1950, l'Assemblée générale décidera (résolution 392/(V)) de confier à un futur accord direct entre la Libye et la France la délimitation des frontières.

Et puis, nous le savons, en 1955 la Libye et la France ne réussirent pas à délimiter les frontières qui n'avaient pas été déjà fixées à l'époque coloniale : elles n'ont su rien faire d'autre que confirmer les délimitations préexistantes. Depuis 1955 il est notoire que la situation n'a pas changé, et les négociations entre la Libye et le Tchad, tant directes que dans le cadre de l'OUA, n'ont pas porté de fruit, sauf pour ce qui est du compromis qui constitue la base de votre compétence.

C'est donc à votre Cour qu'il revient finalement, après tant de détours et de vicissitudes, de régler définitivement un si vieux différend que les Parties concernées n'ont pas su résoudre, puisqu'elles n'ont pas été en mesure de s'acquitter de la tâche que leur avait confiée l'Assemblée générale des Nations Unies. La mission de votre Cour va représenter, en somme, l'accomplissement de celle de l'Assemblée générale et se réalisera sur la base des mêmes principes juridiques, y compris celui qui prescrit de prendre en considération les souhaits et le bien-être des populations concernées, et donc leurs liens ethniques, culturels et sociaux. Il faut en conclure que dans le cas du présent différend le poids des arguments relatifs à la dimension humaine ne dépend pas seulement de l'*aequitas infra legem*, mais découle d'un principe juridique en vigueur et spécifiquement applicable à l'opération de délimitation dont votre Cour est saisie.

Monsieur le Président, Messieurs les juges, voilà les raisons qui amènent la Libye à vous prier de bien vouloir dire et juger que la frontière entre la Libye et le Tchad doit être établie en tenant compte du facteur humain, c'est-à-dire en respectant les liens d'allégeance des populations de la région : leur histoire, leur culture, leur religion, leur organisation sociale expriment un rattachement prépondérant, auquel les normes applicables attribuent un rôle distinct afin que soit déterminée l'appartenance à l'une ou à l'autre des Parties au présent différend des territoires qui constituent leur espace vital. Et ce rattachement joue indiscutablement en faveur de la Libye : M. Bowett reviendra

encore sur cet aspect, qu'il reliera à l'ensemble de l'argumentation de la Libye.

6. La prise en compte de considérations concernant la paix et la sécurité

Je n'ai, Monsieur le Président, qu'à toucher un tout dernier point au sujet duquel, je vous rassure, je pourrai être extrêmement bref.

C'est que les mêmes remarques que je viens de présenter au sujet de la dimension humaine pourraient être répétées, mot à mot, à propos des "exigences de la paix et de la sécurité". Ces termes figurent eux aussi à l'annexe XI du traité de paix avec l'Italie en tant que critères devant présider, tant à la détermination du sort définitif de la Libye, qu'à l'"ajustement" de ses frontières. Je n'ai donc pas besoin de justifier ultérieurement l'affirmation suivante : c'est le droit applicable, et non pas seulement l'*aequitas infra legem*, qui impose à votre Cour d'établir dans le cas présent une délimitation qui soit conforme aux exigences de la paix et de la sécurité, c'est-à-dire qui soit équilibrée, juste et rassurante, qui soit capable de représenter un facteur d'apaisement, de stabilité et de détente pour les peuples et pour les Etats concernés, et non pas une source de tensions nouvelles.

Monsieur le Président, Messieurs les juges, mon espoir le plus sincère est que les observations que j'ai eu l'occasion de vous présenter vous soient utiles afin que vous puissiez vous acquitter de votre tâche.

Je vous remercie.

The PRESIDENT: Thank you very much Professor Condorelli. And now Professor Bowett I think.

Professor BOWETT:

LIBYA'S SUCCESSION TO TITLE

Mr. President, as we approach the end of Libya's presentation of its case during this first round of pleading, it is necessary to begin pulling together all the various strands of the argument.

1. The coalescence of rights and titles in Libya

The location of title has to be looked at on three different levels: for the situation was not the

simple one of a unitary State with a high degree of centralization. Title lay at three levels: with the indigenous tribes at the grass roots level, with the Senoussi at the level of administration and co-ordination between all the tribes throughout the territory, and with a succession of sovereign States — the Ottoman Empire, then Italy, and now Libya — at the international level.

(a) The indigenous tribes

As to the indigenous tribes, the title of the various tribes is not only the longest established claim of title, it is also the one constant in the changing scene. The tribes were there, as socially-organized units, long before the Colonial Powers became interested in this part of Africa: and they are still there now. Their occupation of the borderlands has been continuous, outlasting the Ottomans, the French and the Italians.

The Court has before it a Petition from the Tibesti tribes, dated 3 November 1991 (CML, Vol. 2, Exhibit 3) affirming that these tribes regard themselves "as part of Libya". It is not simply that they see a more prosperous future with Libya: their past has been with Libya, during decades which have seen in Libya, not prosperity, but poverty, war and famine. Their allegiance to Libya has never wavered.

(b) The Senoussi

As to the Senoussi, the cohesion brought to these tribes by the Senoussi has already been amply demonstrated. The partnership between the Ottomans and the Senoussi was never more in evidence than in fighting the French. But in terms of actual administration of the territory the Senoussi were the dominant partner. And Chad does not dispute this. As Chad says in its own Memorial, in 1912 the Senoussia were clearly sovereign.

Chad concedes that, until 1912, sovereign rights over the whole of the borderlands lay with the Senoussi and the Senoussi peoples.

It is evident from the record that France all but recognized the sovereignty of the Senoussi. France did establish formal relations with the Tuaregs, signing the Convention of Ghadamès on 10 March 1863 (see RL, Exhibit 7.10) so France recognized that the territory of the Tuareg was not

terra nullius. The negotiations between France and the Senoussi between 1911 and 1914 (see ML, paras. 4.151-4.165) were designed by France to lead to an agreement.

But France never doubted the reality of Senoussi control over the borderlands. And it was a control which far exceeded any that France itself exercised over the next 50 years.

And there can be no doubt as to the "Libyan" character of the Senoussi. The Senoussi brotherhood was in Tripolitania and Cyrenaica, and it was in the coastal regions of Libya that they carried on their prolonged war of resistance to the Italian invasion, from 1914 until the Treaty of Acroma on 17 April 1917 (ML, International Accords and Agreements Annex, No. 16). And again from 1923 to 1932 during the second Italo-Senoussi war as just described by Professor Condorelli (see ML, paras. 5.221-5.246).

And during the Second World War, the Senoussi again fought, alongside the British, to liberate Libya from the Axis Powers, and it was not surprising that the Emir Idriss, the Senoussi leader, should be the first ruler of the newly-independent Libya.

Hence, there can be little doubt as to Libya's succession to that part of the title to sovereignty over the borderlands which stemmed from Senoussi control. The Senoussi were Libyan: they were the very core of the new State.

(c) Title in the sovereign State

As regards title in the sovereign State, in terms of succession on the international plane, the succession from the Ottoman Empire, to Italy, and then to Libya is clear and direct.

The Ottomans had the prior claim — that is prior to France — and the French were made aware of this claim in 1890, before France even reached Lake Chad.

Now certainly, the Ottoman Empire did not back up that claim by military force throughout the whole area of its claim. Military force was not required for the tribes accepted the Ottoman claim to sovereignty, and the presence of the Ottoman *Kaimakams*, using the traditional delegation of authority, was all that was required. But it did so as regards the borderlands once the French threatened to invade. The map now displayed (Map No. 48) shows how the Ottomans responded to the French invasion with military forces, holding the French south of a *de facto* boundary until their

withdrawal in 1913.

That Turkish claim passed directly to Italy under the Treaty of Ouchy of 1912. France recognized Italy as successor to the Ottoman Empire five days after the Treaty of Ouchy (RL, para. 6.73), and again by Article 10 of the secret Treaty of London of 1915.

It is true that Italy did not send Italian forces to replace the Turkish forces being withdrawn from the borderlands under the Treaty of Ouchy. Italy was militarily fully occupied in the north of Libya, trying to subdue the Ottoman and then the Senoussi forces. And it was Italy's preoccupation with the Senoussi which gave France her chance to allow the French forces to advance northwards into the borderlands.

But this preoccupation with the north of the country by Italy cannot be taken to imply an abandonment of Italian claims to the borderlands as successors to the Ottoman Empire. There were two "programmes" prepared in 1916. And during the 1920s the Italian Ministry of Colonies prepared three "programmes" — essentially three possible claims as successor to the Ottoman Empire. The "maximum" programme of 1928 (Map No. 53) was only slightly different from the Ottoman 1890 claim — extending, as you can see, far to the south of Lake Chad. Now, the "medium" programme (Map No. 54) still extended far south of the borderlands. Even the "minimum" programme, although excluding Kanem, went as far south as 15° latitude (Map No. 55). So it is quite evident that Italy saw itself as successor to the Ottoman claims. Abandonment was never contemplated at that stage.

Moreover, it was clear that the indigenous tribes and the Senoussi had never abandoned their title.

Even more important, France recognized the linkage between the Senoussi and the Italian claims, accepting that, despite the hostility between the two, when opposed to France, Italy could benefit from the Senoussi claims. Thus, as early as 24 October 1916, the French Foreign Minister for Colonies warned of the dangers of abandoning the Tibesti:

> "Les abandonner, même momentanément, aux Senoussis, c'est faciliter les revendications de nos voisins [he is referring to the Italians], qui se considéreront comme les héritiers de la Confrérie." (RL, Vol. 3, Exhibit 11.3.)

So Italy not only succeeded to the Ottoman claims, but stepped into the Ottomans' shoes in the partnership of title that had earlier rested in the tribes, the Senoussi and the Ottoman Empire.

What, then, caused Italy to retreat from the Ottoman claims so dramatically in agreeing to the 1935 line? There were two main reasons. One was Marshal Badoglio's lack of interest in territory he considered to be sterile, unproductive desert (ML, para. 5.306).

The second, and far more important, reason was that Mussolini thought that by abandoning his Libyan claims he had secured French support for his conquest of Ethiopia. And so the 1935 Treaty came about.

The Court is by now fully aware of why the 1935 Treaty never came into effect. That it was a retreat from, or abandonment of, not only the Senoussi claims but also the Ottoman claims is beyond doubt. And had the 1935 Treaty entered into force, Libya's position would now be very difficult. Arguably, Libya's position would have been irretrievably compromised.

Fortunately that did not occur, so the position is that Libya inherited from Italy the claims *as they existed pre-1935*.

The difficulty is that, as claims to *title*, these claims do not immediately translate into a clear, identifiable claim to a specific boundary line. It is a difficulty inherent in this type of territory. With nomadic tribes in desert or mountainous territory, precise boundaries have rarely been recognized. Moreover, unlike the Spanish territories of South or Central America, there were never any clear administrative boundaries established by the Ottoman Empire, or by Italy, or even, let me add, by the French to the south.

But the difficulty is not insurmountable, and the law does possess criteria which can assist in identifying a boundary in circumstances such as these. It is to these that I now turn.

2. The boundary which emerges from the whole history of the affair, in accordance with the criteria provided by the law

Chad accepts that in 1912 it was the Senoussi who exercised sovereign rights over the whole of Borkou, Ennedi and Tibesti; and that accords with Libya's view, so we have an agreed premiss with which to start.

And from this agreed premiss we can now move quite easily to our first criterion. What, on the factual evidence were the limits to French effective possession established between 1912 and 1919, the date by which Chad says French title was effectively established?

(a) The limits to French effective possession acquired by conquest between 1912 and 1919

Chad argues that the French title — and the boundary establishing the limits of that title — were established by 1919. So we need to look at the extent of French conquest during these seven years, before conquest became outlawed as a means of acquiring territory.

We can illustrate the situation best on the map. Remember that the Ottomans had held the French roughly along the 15° parallel until their withdrawal in 1913 (Map No. 48). Then, after the Treaty of Ouchy had brought about the Turkish withdrawal, the French advanced. But what occurred was not a steady advance, with the French forces consolidating and occupying all the territory behind their lines. There were no lines. The French forces were too small for that. What we had were a series of penetrations by French columns, culminating in isolated battles. The French progress can be seen on the map now on the screen (Map No. 81).

The French occupied Oum Chalouba, just north of 15° and then in May 1913 a French column, some 90 men under a Lieutenant Dufour, attacked Oum el Adam, and fought off a strong counter-attack on 21-22 May. Further Senoussi attacks occurred, against a convoy at Oum Chalouba on 6 June, against Ati — as far down as 13° parallel — in August, and against a caravan near Tekro on 22 November.

But the French took Aïn Galakka on 27 November 1913, they took Faya on 3 December and, leaving 50 men at Faya, sent a column north to Gouro which they reached on 14 December.

But when the official French history speaks of "la conquête de Borkou", one has to bear in mind not only the limited size of the French military presence, but also the continuing hostilities (Map No. 82). As the figures of the French official military history shown, in Borkou the French presence consisted of the 7th Company at Faya, the 8th Company at Fada, and small outposts at Aïn Galakka, Gouro and Ounianga-Kebir; perhaps 300 men at most.

This was not an effective belligerent occupation of the whole of Borkou. Mohammed Erbeimi

attacked the post at Gouro in November 1914, and attacks continued through 1915. Between April and May 1915, fighting was still occurring around Gouro (Map No. 83).

By 1916 the Senoussi attacks are characterized as becoming "more aggressive", with Mohammed Erbeimi mustering 800 men near Fada. As the official history reports: "En résumé, fin 1916, la situation sur cette frontière [speaking of Borkou-Ennedi] restait sinon grave tout au moins inquiétante." (*LCM*, Exhibit 13, p. 467.)

Scarcely a description of an effectively-occupied territory!

In 1917, the French remained in occupation of the same five places — Faya, Fada, Aïn Galakka, Gouro and Ounianga-Kebir (Map No. 83). They sent out reconnaissance patrols, still chasing Mohammed Erbeimi and skirmishing with the Senoussi whenever the two sides met. Erbeimi captured a French supply caravan, en route from Oum Chalouba to Faya, only for the French to retake it two days later.

By 1918, some Senoussi chiefs sought a truce with the French, but not Erbeimi, and French reconnaissance patrols ranged further north to the outskirts of the Tibesti mountains. Even in 1919, clashes with what are described as *rezzous* or *dissidentes* are still reported; and no further locations are actually occupied, permanently, by French forces.

What conclusion does all this suggest? It must be that by the end of 1919 there was no occupation in the sense required by international law north of the 15° parallel. Kanem, to the west, was relatively secure. But neither Borkou nor Ennedi were securely occupied — and, of course, Tibesti had been completely evacuated by the French. Whether you call it "effective" occupation or "belligerent" occupation, it could not have been achieved by so few men, controlling so few places. Certainly, given the continuing resistance to the French. And so the 15° latitude emerges as the maximum northerly reach of any *effective* occupation by France. The occasional clashes that occurred to the north of 15° parallel were not part of any scheme by France to occupy territory north of 15°; they were part of the policy of "pacifying" the Senoussi tribes so as to protect the territory south of 15°.

Now, before leaving this part of my presentation I ought to say a few words about the map

appearing in Chad's Counter-Memorial at page 254, which is entitled "Progression de l'Occupation Française 1900-1914". The reason is that what I have just said about the nature and extent of the French occupation or military penetration into the borderlands does not tally at all with Chad's Map. And the Court is entitled to an explanation.

The explanation is simple enough: Chad's Map is a complete distortion of the true picture. Let me give a few examples.

Aouzou is marked by Chad as if occupied in 1914. The truth is that a French column passed through Aouzou in 1914. It was not "occupied" until 1930, and then left completely unmanned from 1935 to 1937, briefly re-manned from 1937 to February 1938, and then vacated again until April 1954.

Bardaï is marked as "occupied" in 1914. But it was in fact abandoned two years later in August 1916 and not re-established until 1930.

Wour is also marked as "occupied" in 1914: the first French post was actually established in 1930.

Tekro is similarly marked. In fact it was passed through by a French patrol in 1914 on the way to the Sarra Wells to se if the wells could be destroyed. The first French post was not established there until December 1933.

The Court will understand my request that it should not place reliance on Chad's Map. The account of events I have given is based on the official French Military History of the campaign and, to the best of our knowledge, is accurate.

(b) The limits to be discerned from the negotiating positions of the parties during negotiations over the boundary

Let us now examine the limits to be discerned from the negotiating positions of the parties during the negotiations over the boundary. In examining the negotiating positions assumed by the parties, we need to keep in mind the distinction made by the Court — I refer to the recent Judgment in the *Honduras/El Salvador* case — between offers made without prejudice, and clearly designed to achieve a compromise, and statements of position which reflect a party's own view of its legal

claims.

We know that, in preparation for boundary negotiations between the Ottoman Empire and France, the Vilayet of Tripoli prepared its own proposal in 1911. And you can see this represented on the map (Map No. 85), and it is clearly an attempt to reflect the realities of the situation. As compared with the Ottoman claim of 1890, the 1911 proposal suggested a degree of realism. The French control over Lake Chad was accepted; the French control over Kanem, directly north of Lake Chad, was accepted. But to the east it is the 15° line of latitude which stands as the limit to which French claims were to be admitted. Borkou, Ennedi and Tibesti lie *outside* the area to be conceded to France.

Now, with the start of the Italo-Turkish war in 1911, nothing came of the planned negotiations, and it was left to Italy to take up the negotiations.

The Court is already familiar with the development of the Italian negotiating position. Italy's first "programmes" were prepared in 1916. By 1928 Italy had conceived of three "programmes" or claims: a "maximum"; a "median" claim; and a "minimum" claim as I have already mentioned.

Now let us take this last, minimum claim (Map No. 56). It displays a marked similarity to the 1911 proposal by the Vilayet of Tripoli, which is now being shown on the screen. That is to say, France was conceded to have acquired Kanem. But, further east, the claim goes down as far as 15° latitude, and the whole of Borkou, Ennedi and Tibesti lie *outside* French control. The major difference lies here in the west, in Kaour, where Italy's claim extended further westwards.

Now, certainly these Italian "programmes" were internal studies, and not, as such, presented to the French. But they do indicate what Italy thought its entitlements might be and, in a sense, the very fact that they were internal increases their significance. For they were not designed as a pure negotiating tactic, an extravagant claim to be shown to France as the first shot in a bargaining process.

The first claim formally communicated to France came in 1929. And it can be seen on this Map (Map No. 57) and, clearly, it is less ambitious than the earlier "minimum" claim. It shows a retreat both in the west and in the south: the line moves up from 15° to 18°, so as to divide Borkou

and Ennedi.

But here we are clearly seeing a bargaining process and, as such, it is a less reliable indicator of what Italy itself regarded as a reasonable maximum claim.

This is even more true of Italy's compromise offer in 1935. This resulted in final agreement between Italy and France on a line which divided Tibesti, and then proceeded south-west to meet the line of 24° longitude at 18°45' latitude (Map No. 64). The effect of this was more or less to divide the territory between the strict south-east line established in the 1899 Convention and the 1919 line.

But this was pure compromise. Whatever the merits of the 1935 line as a compromise between the Italian and French claims, the fact is that it never became a conventional boundary.

This is why Libya feels entitled to go back to the proposals of the Ottomans and of Italy itself, developed long before this outrageous "bargain" was conceived. And this is why, in Libya's present claim, Libya has relied far more on the 1911 proposal, and the Italian "minimum" proposal conceived in 1928.

Now, Libya's present claim can be seen on the map now on the screen behind me, together with the 1911 Ottoman proposal and the 1928 Italian "minimum" claim (Map No. 86). As can be seen, it follows the earlier recognition by both the Ottomans and Italy, that Kanem had been lost to the French. But it adheres to the view that, further east, 15° of latitude was the correct boundary, and that Borkou, Ennedi and Tibesti must remain on the Libyan side of any boundary.

As Libya itself has recognized in its written pleadings, that cannot be the end of the matter, in the sense that, in any exercise of attribution of territory, the Court is entitled to have regard to certain equitable criteria. We must therefore move on to see whether these criteria support, or reject, a boundary in that location.

(c) The relevance of equitable criteria

Of these criteria, four seem to be of direct relevance.

1. The ties that naturally link the people of the borderlands to Libya

Ethnically, culturally, linguistically and religiously, the tribes of the borderlands have always

been linked to Libya. The military campaigns fought by the French were designed to destroy those links, and they failed.

It is beyond belief that the Court, as the principal judicial organ of the United Nations, will ignore these links in carrying out its task. Perhaps the most singular advance made by the United Nations over the last 40 years or so is to recognize that territory belongs to the people that inhabit it. It is not a commodity to be bartered as if the inhabitants did not exist. This consideration is all the more relevant to the present case, precisely because, under the 1947 Treaty of Peace with Italy, the United Nations has taken over the task of establishing the boundaries of Libya, taking into account the aspirations and the well-being of the inhabitants.

2. Geographical considerations

The borderlands are, geographically, very different from Chad. North of 15° latitude, one moves from savannah to desert, and with that change comes a change in the people and in their lifestyle. The desert nomad, the Arab, replaces the African farmer and pasturalist.

The Tibesti mountains are, of course, a special feature. Their very inaccessibility has always distinguished them from the rest of the borderlands. It is no accident that the French abandoned the Tibesti completely from 1916-1929, and it is no accident that Libya has always attached a special importance to controlling the Tibesti.

The occasional rumours of vast mineral riches within the Tibesti are now discounted. There is virtually no evidence to support such rumours.

3. Economic considerations

The reality of the economic considerations that affect this area are not these myths of mineral riches, but rather the long-established economic ties that exist between the people of the borderlands and Libya to the north.

The caravan routes have always gone north, to the Mediterranean coast. It is towards Libya that the people have traditionally looked — for their supplies, for markets for their animals, for medical help when needed, and for military help to meet foreign invasions from the south.

4. Consideration of long-term stability

So far as the inhabitants of the borderlands are concerned, a stable boundary marking their attachment to Libya will contribute to the long-term security of the region as a whole. The civil war that has raged in Chad may have had many causes. But not the least of these has been the attempt to retain the vestiges of control left by the French, and so artificially divide the people of the borderlands from Libya.

For Libya itself, security is a matter of the highest priority. It is no accident that the primary aim of France, in moving the south-east line from its position in 1899 to its position in 1919, was to control the whole of the Tibesti. It is equally no accident that Italy opposed this, and, even in the compromise proposal of 1935, insisted on retaining the northern half of the Tibesti. For the Tibesti have always dominated the strategic thinking about the region.

This situation has not changed. It is not that, today, Libya fears an attack by Chad. Libya and Chad are moving towards an amicable co-operative relationship. But there may be other Powers that might in the future see Libya as vulnerable to an attack from the south — an attack that would lead into the Libyan oilfields and the Libyan water basins. So, for Libya, the Tibesti are an important part of its territory that it must defend. The demands of peace and security were determined to be relevant to Libya's boundaries in 1947, by the express terms of the Treaty of Peace: their relevance in 1993 is even greater.

Mr. President, Members of the Court, these are the criteria and factors which Libya would urge on the Court as legally relevant to producing an actual boundary line. It is not a line, every point of which can be supported by concrete, historical evidence. But the essential location of the line does emerge from the criteria and factors I have just outlined. And the equitable considerations are fully consistent with Libya's claim.

Mr. President, Members of the Court, that concludes the first phase of Libya's argument.

On behalf of the Libyan Agent and all Libyan counsel, I would like to express to the Court our appreciation for its patience and courtesy. Thank you.

The PRESIDENT: Thank you very much, Professor Bowett.

Now, before we adjourn, I ought to say that the Court has received a communication from the Agent of Chad to the effect that 7 sessions will suffice for the presentation of the Chad first round of pleadings and accordingly we shall begin with the Chad presentation on Friday morning at 10 o'clock. There will be no session on Friday afternoon and we shall resume on Monday morning at 10 o'clock.

Thank you very much.

The Court rose at 1 p.m.

CR 93/21

International Court
of Justice
THE HAGUE

Cour internationale
de Justice
LA HAYE

YEAR 1993

Public sitting

held on Friday 25 June 1993, at 10 a.m., at the Peace Palace

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le vendredi 25 juin 1993, à 10 heures, au Palais de la Paix

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

comme experts.

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT : This morning we will begin with the first presentation of Chad, and I call first upon the Agent, Mr. Dadi, to address the Court.

M. DADI : Monsieur le Président, Messieurs les juges,

C'est un grand honneur pour moi de prendre la parole, au nom de mon pays, devant cette Cour, composée des juristes les plus éminents du monde.

Le Président Idriss Deby, présent dans cette salle, à l'ouverture des audiences, m'a demandé de transmettre ses salutations à vous-même, Monsieur le Président, au Vice-Président, à tous les juges, au Greffier et au personnel du Greffe. Je le fais avec plaisir et respect.

Monsieur le Président, cette présence du Président Deby signifiait deux choses : l'importance vitale qu'attachent le Gouvernement et le peuple tchadien à cette partie du territoire national qu'est la bande d'Aozou et la confiance qu'ils placent en votre Cour.

Le Tchad souhaite le règlement définitif de ce différend, à l'origine de plusieurs confrontations militaires avec la Libye, par le triomphe du droit.

Voulant éviter la confrontation, le Tchad a saisi, tour à tour, les grands forums internationaux : l'ONU, l'OUA, l'organisation de la conférence islamique, le mouvement des non-alignés, les sommets franco-africains; il a utilisé toutes les possibilités de règlement pacifique des différends, y compris et d'abord les contacts directs avec la Libye. Celle-ci, en revanche, s'est constamment dérobée et n'a pas hésité à utiliser la subversion et la force armée.

Monsieur le Président, nous venons d'écouter la Libye : sur un ton assuré, ce pays a fait valoir des revendications territoriales, bien inquiétantes, pas seulement pour le Tchad mais aussi pour d'autres Etats non présents dans cette affaire, revendications sur lesquelles sont matériau cartographique a jeté une lumière particulière.

Après ce premier tour de plaidoiries orales de la Libye, plusieurs choses frappent. Monsieur le Président, je me suis surtout posé cette question : de quoi et avec qui la Libye parle-t-elle ? Vous l'avez peut-être constaté, Messieurs de la Cour, la Libye croit, ou fait semblant de croire, être en procès contre la France, et parle de programmes coloniaux d'expansion territoriale. Elle se réclame exclusivement des programmes coloniaux turcs et italiens, et s'en prend à la France d'en avoir empêché leur réalisation; le Tchad devrait répondre de ce grief, aujourd'hui, devant vous.

Il y a pourtant deux Parties devant vous : le Tchad et la Libye au sujet d'Aozou.

Monsieur le Président, la Turquie, la France, l'Italie, ajoutons aussi la Grande-Bretagne, ont colonisé des peuples et conquis des territoires. Le colonialisme, période sombre de l'histoire de l'humanité, a pris fin. Faire comme la Libye, l'histoire à reculons et prétendre en tirer des conséquences maintenant, est inacceptable. Le Tchad aime à penser qu'il ne saurait être question de satisfaire, aujourd'hui, des aspirations coloniales insatisfaites. C'est un question d'éthique autant que de droit. Votre Cour, qui est un organe des Nations Unies, ne peut l'ignorer.

La Libye a tenté de s'emparer, par la force, d'une partie du territoire tchadien; voilà, de façon un peu abrupte, la réalité dont les conseils du Tchad tireront les conséquences juridiques.

Monsieur le Président, je voudrais, très succinctement, rappeler quelques faits; ils ont leur importance à notre sens.

Le 31 août 1989, la Libye et le Tchad, en conflit armé depuis le milieu de 1982, signaient à Alger, grâce à la médiation de l'Algérie et sous l'égide de l'OUA, un accord-cadre dont l'un des buts était de régler le différend frontalier de la bande d'Aozou, à l'origine de la tension entre les deux Etats.

Couronnement des efforts de médiation de l'OUA, cet accord préconisait avant tout un règlement politique de ce différend par des négociations bilatérales directes et fixait le terme d'un an; au-delà duquel la Cour internationale de Justice devrait être saisie pour un règlement juridictionnel, ce que firent les deux Parties.

Le 26 août 19991, le Tchad prend connaissance du mémoire de la Libye et découvre avec surprise que la demande de ce pays, débordant de très loin le cadre de la bande d'Aozou, portait sur la moitié de son territoire.

Monsieur le Président, la Libye poursuit un dessein territorial visant à reconstruire la très grande Libye qui, selon ses plaidoiries, serait allée de Tripoli au lac Tchad et dont les voies auraient été ouvertes par les Senoussistes et par les Ottomans, on ne sait trop, il y a un siècle.

Cette Libye inclurait plusieurs territoires, certains très riches en pétrole, d'autres en uranium, qui appartiennent aujourd'hui à ses voisins. L'une des superbes cartes présentées par la Libye

indique l'existence des *zaouïas* senoussistes à Kano, au Nigéria, dans l'Adamoua, au Cameroun et au Niger...

Mais la reconstruction de cette Libye, en réalité plus mythique qu'historique, se réaliserait pour l'essentiel au détriment du Tchad, pays pauvre, pluri-ethniques, secoué par une longue guerre civile, pour tout dire un pays faible économiquement et fragile politiquement.

Monsieur le Président, la demande du Tchad, elle, vise uniquement à préserver son intégrité territoriale. Les arguments du Tchad sont articulés dans ce but. Le Tchad ne revendique aucun territoire appartenant à un autre Etat. Il ne demande qu'une chose : la justice.

Monsieur le Président, dans la présente affaire, quoi qu'en dise la Libye, aucun territoire libyen n'est en jeu : la Libye entend garder l'héritage qu'elle a reçu de l'Italie et partager celui que la France a laissé au Tchad. Une réponse simple à cette proposition : que chacun garde ce qu'il a reçu, il n'y a rien à partager.

La Libye revendique la moitié du Tchad : la préfecture du Borkou-Ennedi-Tibesti tout entière, plus des territoires faisant partie de la préfecture de Biltine, soit au total la moitié, je le redis, la moitié du territoire tchadien.

Mais la Libye ne peut pas charger la Cour d'une mission de démembrement d'un Etat souverain; en tout cas la Cour ne l'accepterait pas, nous en sommes sûrs. Du reste, si nous comprenons bien la logique libyenne, le Tchad, en acceptant la juridiction de la Cour, aurait commis l'erreur fatale. Je ne peux pas imaginer qu'il serait plus dangereux pour un pays comme le Tchad de venir devant la Cour que de laisser un litige en l'état !

Monsieur le Président, en vérité, la Libye a des problèmes avec cette affaire. C'est la raison de ses efforts extraordinaires pour dénaturer le litige.

Si, indépendamment d'Aozou occupée par la force, il y a problème au sujet de la frontière commune, c'est un simple problème de matérialisation de la frontière sur le terrain, de démarcation.

La Libye, elle, affirme faussement que l'histoire du différend qui l'oppose au Tchad est "trop lointaine" et "trop compliquée" (mémoire de la Libye, chap. I, p. 2-3).

L'origine du différend remonte à une vingtaine d'années, pas davantage, lorsque, profitant de

la guerre civile qui ravageait le Tchad, la Libye s'est implantée dans la région d'Aozou.

La revendication actuelle de la Libye, apparue pour la première fois dans le mémoire de ce pays et qui met en cause de vastes territoires tchadiens, n'est rien d'autre qu'une manœuvre judiciaire.

Alors que le différend porte sur la frontière commune, la Libye cherche à entraîner le Tchad dans une discussion inutile sur des territoires n'ayant jamais été objets de la moindre contestation. Son but est certainement de détourner l'attention, non seulement de la question essentielle, celle de la bande d'Aozou, mais également de l'instrument principal qui donne la solution, le traité du 10 août 1955 entre le Royaume-Uni de la Libye et la France à laquelle le Tchad, devenu indépendant en 1960, a succédé.

Monsieur le Président, Messieurs les juges, arrêtons-nous quelques instants sur le traité du 10 août 1955.

Pour le Tchad, le traité du 10 août 1955 est la clé du différend. Librement, la Libye l'avait négocié, signé et ratifié. Ce traité est incontournable et décisif. Son application suffit à régler le litige.

Monsieur le Président, l'approche libyenne des questions frontalières, telle qu'elle s'exprime à travers ses plaidoiries, est subversive : en effet, la Libye prétend qu'il faut une vérification générale des conditions dans lesquelles le partage de l'Afrique fut opéré, il y a plusieurs siècles, afin de faire, s'il y a lieu, droit aux pays qui auraient été lésés par les puissances colonisatrices. Bien entendu, la Libye s'affirme être victime du partage colonial et entend par exemple faire payer au Tchad une "promesse politique" concernant l'expansionnisme colonial italien, faite par la France et la Grande-Bretagne à l'Italie, en 1915.

La Libye prétend qu'il est légitime que tout pays africain demande, à tout moment, un "audit" rétrospectif de tous les accords et traités concernant ses frontières conclus entre les puissances coloniales et qu'en règle générale, les délimitations arrêtées pendant la période coloniale devraient faire l'objet d'un doute.

Le message de la Libye est on ne peut plus clair et plus direct : "gratter la surface" (contre-mémoire de la Libye, chap. 2, p. 19-22). En d'autres termes, Monsieur le Président, pour la

Libye, rien n'est acquis au sujet des frontières, ceci en contradiction flagrante — malgré ses dénégations — avec la résolution du Caire de l'OUA.

Monsieur le Président, dans ses écritures, le Tchad, soucieux de contribuer à l'approfondissement du débat judiciaire, n'a pas insisté sur les enjeux politiques de l'affaire d'Aozou.

Le moment est cependant venu de dire quelques mots sur ces enjeux pour le Tchad d'abord et, au-delà, pour l'Afrique tout entière.

Pour le Tchad, l'enjeu est triple : il s'agit de son intégrité territoriale, de son unité et de son développement économique.

L'intégrité territoriale du Tchad est menacée.

La Libye occupe la bande d'Aozou depuis 1973 par la force.

Cette situation lui paraissant mal assurée, elle entreprit, dès 1977, de consolider le fait accompli en vue de rendre irréversible l'occupation d'Aozou. Le Tchad, bien sûr, s'y oppose avec tous les moyens dont il dispose, n'hésitant pas à préserver ses droits, fût-ce en prenant le risque d'une confrontation armée avec son puissant voisin. Ainsi, la Libye envahit militairement le Tchad en 1977-1978, 1980, 1983 et 1984, parvenant de 1984 à 1987 à contrôler toute la préfecture du Borkou-Ennedi-Tibesti. En même temps, elle affirmait, paradoxalement qu'elle soutenait un "Gouvernement tchadien" qui prétendait avoir installé sa capitale à Bardaï, à 80 kilomètres au sud de la palmeraie d'Aozou. La Libye le soutenait et est allée jusqu'à revendiquer pour lui, avec acharnement, de 1982 à 1987, le siège du Tchad à l'OUA et à l'ONU. Ceci est difficilement compatible avec le caractère libyen de cette région, affirmé aujourd'hui par notre voisin du nord. Décidément, la Libye a des pertes de mémoire !

Aujourd'hui, par une demande dont l'ampleur va au-delà des craintes les plus fortes, la Libye dévoile son intention de parvenir à la dislocation du Tchad et présente cette sombre perspective comme une heureuse occasion pour ce pays de connaître enfin la stabilité.

Un Tchad divisé et instable est le plus sûr moyen pouvant permettre à la Libye de réaliser son projet territorial. C'est ce qui, en réalité, pousse à attiser constamment les dissensions internes, susciter des dissidences et encourager les rébellions aux régions en place à N'Djamena.

Monsieur le Président, il est certes vrai qu'aujourd'hui, les relations tchado-libyennes sont meilleures qu'hier mais le présent n'efface pas le passé et, plus inquiétant, ne garantit pas l'avenir.

Monsieur le Président, la Libye cherche à utiliser à son avantage tous les problèmes qu'a connus le Tchad y compris ceux, provoqués par elle : parmi ces problèmes, il en est un qui a une incidence directe sur la présente affaire, c'est celui des archives de la préfecture du Borkou-Ennedi-Tibesti, emportées ou détruites par la Libye.

Depuis 1973, la Libye a inauguré ce que l'on pourrait appeler une "politique tchadienne", consistant à empêcher l'émergence d'institutions capables d'agir avec efficacité et avec toute la cohérence souhaitable en particulier sur la scène internationale mais la Libye n'a pas toujours atteint ses objectifs, le colonel Kadhafi s'est souvent plaint de l'ingratitude de ses alliés révolutionnaires tchadiens.

Monsieur le Président, si vous le voulez bien passons de la politique à la géographie. La Libye, cartes à l'appui, a affirmé qu'à partir du 15e parallèle, les données géographiques du Tchad changement : au nord de cette ligne, les régions sahélo-sahariennes, au sud, les régions soudaniennes. Cela est vrai et on l'enseigne aux petits écoliers tchadiens, je ne vois pas ce que la Libye voudrait en tirer au plan juridique. Les frontières du Tchad, comme celles de bien d'autres pays, sont là où l'histoire les a mises et la géographie y a peu à voir.

La Libye utilise toutes les réalités géographiques et humaines du Tchad, volontairement à tort et à travers : cette histoire de peuple et de tribu senoussi, exposée avec fracas, c'est de la mystification, il n'y a pas d'autre mot, Monsieur le Président.

Je suis originaire des régions que la Libye qualifie de "borkolands". Nos voisins, au nord, sont des Fezzanais et des Tripolitains, des gens, si j'ose dire, d'un autre monde. Monsieur le Président, c'est exactement comme si un étranger vous faisait visiter votre propre maison. C'est étrange, c'est vraiment étrange, cette leçon d'histoire que la Libye nous a donnée sur le peuple toubou, devenu "tribu senoussi".

Monsieur le Président, l'existence du Tchad en tant qu'Etat indépendant dans sa configuration géographique est en jeu. L'affaire de la bande d'Aouzou a, pour l'opinion publique tchadienne qui la

suit avec une attention passionnée, une portée psychologique difficile à exprimer en des termes non subjectifs.

L'attachement du peuple tchadien à la bande d'Aozou a conduit des observateurs étrangers indépendants, à parler de cette région comme de "l'Alsace-Lorraine" du Tchad. Si, pour la Libye, la bande d'Aozou est un "borderland", pour le Tchad, elle en est le cœur, non pas certes géographique mais bien politique.

La bande d'Aozou n'est pas seulement, en droit, un territoire appartenant au Tchad, c'est aussi un symbole. Sur elle se réalise un consensus rare au Tchad, consensus dont on vient d'en avoir la preuve par la résolution spéciale adoptée à l'unanimité par la conférence nationale souveraine, un forum réunissant plus de mille délégues, tenue à N'Djamena du 15 janvier au 6 avril 1993.

Monsieur le Président, la Libye convoite les ressources naturelles et minières du Tchad : uranium, wolfran, tungstène sont les richesses actuellement connues auxquelles il faut ajouter l'importante nappe d'eau dont regorge la région revendiquée. Oui, l'eau qui est l'obsession actuelle de la Libye.

Ce pays ne cherche d'ailleurs pas à dissimuler ses intentions, au contraire, il les justifie, affirmant que sa richesse actuelle, le pétrole, est inépuisable.

Le développement du Tchad est hypothéqué par la présence de troupes étrangères sur une partie de son sol : le Tchad consacre environ 50 pour cent de son budget à des dépenses militaires. Un tel effort interdit toute politique de développement économique et social et condamne les populations à la misère, à la maladie et à l'ignorance.

Il est vrai que la Libye n'est pas le responsable originel de l'état de sous-développement que connaît le Tchad. Mais en attisant les conflits internes et en imposant la guerre et la tension permanente à un peuple d'ordinaire préoccupé par la satisfaction de ses besoins élémentaires, elle contribue indéniablement à aiguiser ses problèmes et à empirer sa situation.

La Libye, de son propre aveu, cherche aussi à démembrer le Tchad pour des raisons de sécurité et d'ordre militaire : pays riche, elle dit avoir droit à une protection plus importante et affirme que pour la protection de ses puits de pétrole contre un éventuel danger, elle a besoin des

montagnes du Tibesti.

Par cet argument, il est difficile de savoir ce que, réellement, la Libye cherche à démontrer : que le Tchad la menace ou bien qu'à cause du Tchad, elle se sent menacée ?

Monsieur le Président, tout le monde sait comment, en 18885, à la conférence Berlin, les puissances colonisatrices européennes avaient procédé au dépeçage de l'Afrique : sans aucun égard pour les peuples et leur histoire, elles ont tiré à la règle des lignes arbitraires.

Il en est résulté des frontières artificielles et rarement démarquées sur le terrain. A la décolonisation, cette réalité fut prise en compte par les nouveaux Etats dans un souci de stabilité et de réalisme car il était impossible de corriger les aberrations du découpage colonial. Chaque Etat devait se contenter de son héritage. Tel était le sens de la résolution de l'OUA adoptée au Caire en 1964, sur les frontières héritées de la colonisation et qu'on a traduit par le principe de l'inviolabilité. Arbitraires et non démarquées, telles sont les caractéristiques de la quasi-totalité des frontières africaines. Il va de soi que les contestations et les revendications s'en trouvent naturellement facilitées.

La vigilance de votre Cour sera salutaire pour le continent africain tout entier : le succès des thèses libyennes pourrait réveiller "les crocodiles qui dorment" tandis que leur rejet découragera définitivement ceux qui n'attendent qu'un signal.

Monsieur le Président, la Libye est loin d'être pour le Tchad, ce voisin attentionné et bienfaiteur que son agent, s'appuyant sur le Coran, a décrit à l'ouverture des audiences. La réalité est autre et les Tchadiens, eux, se souviennent de quelques invasions militaires libyennes. Bien sûr, je ne conteste pas que la Libye pratique la charité mais je doute que le Tchad en soit le bénéficiaire !

La Libye a insisté sur la différence de statut et de capacité entre elle et la France, ce qui au demeurant, n'est pas le sujet.

Permettez-moi, cependant, Monsieur le Président, d'évoquer en quelques mots seulement, la différence qui sépare, en terme de richesse, de savoir-faire et de puissance, le Tchad et la Libye. Cette différence, entre deux pays d'Afrique, l'un parmi les plus riches et l'autre parmi les plus pauvres du monde, est impressionnante.

Le Tchad en est persuadé, votre Cour ne permettra pas à des Etats puissants comme la Libye, de menacer l'intégrité territoriale et l'unité politique de petits Etats comme le Tchad, au prétexte qu'il faudrait rétablir les frontières naturelles ou redresser des injustices historiques dont, en l'occurrence, la réalité n'apparaît guère.

A vrai dire, est-il raisonnable pour la Libye, qui dispose d'un très grand territoire, d'une importante façade maritime et d'un sous-sol regorgeant de pétrole, de tenter de priver le Tchad, pauvre, enclavé, classé à juste titre parmi les "PMA" — les pays les moins avancés — de ses très rares atouts naturels ?

L'histoire, s'il faut en parler, fut-elle vraiment juste à l'égard du Tchad privé de façade maritime ? Il vit pourtant avec ce handicap qui n'est pas des moindres.

Monsieur le Président, l'affaire d'Aozou est un enjeu au-delà du Tchad, puisque la Libye conteste radicalement le principe du respect des frontières héritées de la colonisation que les Etats africains considèrent, à la quasi-unanimité, comme une règle sacro-sainte et un rempart contre des revendications en chaîne.

La conviction est générale et forte, au sein de l'OUA sur le rôle stabilisateur de ce principe. Même les Etats qui ont rejoint l'organisation bien après 1964, notamment les Etats lusophones, n'ont pas cherché à le remettre en cause, au contraire, ils l'ont accepté. C'est dire la force de l'engagement de l'OUA sur les questions frontalières et territoriales.

La Libye a eu le rare privilège de participer directement à la définition de ses frontières, au surplus, dans un cadre international, et selon un processus conduit par les Nations Unies, offrant donc des garanties techniques et de justice. Peu d'Etats africains ont eu cette chance, en tout cas, pas le Tchad.

Le discours anticolonialiste qui fait fond à ses plaidoiries est une rhétorique, destinée à pallier son défaut patent de toute preuve documentaire face au Tchad qui en détient de nombreuses, traités et accords.

Toutes les preuves formelles allant contre sa thèse, la Libye croit bon de discréditer le Tchad, en invoquant contre lui, l'anticolonialisme et en assimilant sa cause à celle de la France. La Libye

devrait se garder d'affirmations de ce genre, elle, qui cherche à bénéficier des dispositions du traité de Londres de 1915, quintessence même du colonialisme européen.

Monsieur le Président, puis-je rappeler à la Libye qu'elle n'a pas le monopole de l'anticolonialisme. Quant au Tchad, il ne défend pas un passé colonial dont il a eu à souffrir autant que la Libye mais la stabilité territoriale, une stabilité qui lui est chère comme à tous les Etats africains issus de la décolonisation.

Monsieur le Président, le Tchad est fier que des juristes éminents aient accepté de présenter sa cause devant votre haute juridiction. Leurs noms et qualités ont été communiqués au Greffe et ceci me dispense de les citer. Mais je souhaite leur adresser ici, publiquement, les remerciements de la République du Tchad, ainsi qu'à leurs collaborateurs.

Monsieur le Président, Messieurs les Juges, je vous remercie de votre attention.

Monsieur le Président, je vous prie de donner la parole à l'agent adjoint du Tchad, le professeur Alain Pellet.

The PRESIDENT: Thank you very much Mr. Dadi and now could we have Professor Pellet.

M. PELLET : Monsieur le Président, Messieurs les Juges, c'est avec émotion et plaisir que j'ai l'honneur de me présenter à nouveau devant vous, mais aussi, je l'avoue, avec un peu d'appréhension — non pas que j'aie des doutes sur le bien-fondé de la thèse que le Tchad soutient ici; mais parce que j'ai conscience de l'importance de l'enjeu. Toutes les affaires qui sont plaidées devant vous sont importantes; mais celle-ci est vitale — en tout cas pour le Tchad auquel la Libye dispute une immense partie de son territoire.

Mon très bref exposé de ce matin a pour objet d'une part de mettre en évidence certains procédés de "démonstration" — je mets le mot entre guillemets — utilisés par la Libye et qui nous ont paru discutables et, d'autre part, de présenter les grandes lignes et le plan de nos propres plaidoiries.

a) Les procédés libyens de "démonstration"

Monsieur le Président,

1. J'ai écouté, avec beaucoup d'attention, les conseils de la Libye, auxquels l'affaire qui nous divise ne m'empêche pas d'adresser un cordial salut. Ce sont presque tous des amis de longue date.

Et au terme de leurs prestations, parfois brillantes, nous ressentons, de ce côté-ci de la barre, une impression étrange. Nous croyions venir plaider une affaire devant le "principal organe judiciaire des Nations Unies". Nous nous préparions à réfuter des arguments juridiques afin de permettre à la Cour de s'acquitter de sa mission qui "est de régler conformément au droit international les différends qui lui sont soumis". Or, durant sept longues séances, nous avons assisté à un tout autre exercice. Bien sûr, les apparences sont sauves : la Partie libyenne énonce avec une conviction de façade certains principes de droit — qu'elle interprète du reste avec une fantaisie qui fait honneur à l'imagination de ses conseils. Mais ces principes soit ne sont pas reliés au fait qui sont à l'origine du différend qui oppose les Parties, soit ne sont qu'un mince voile d'apparence juridique qui dissimule mal une volonté expansionniste que votre haute juridiction ne peut pas satisfaire.

Au fond, la Libye, qui, comme le montreront les professeurs Higgins et Franck, n'a jamais saisi l'occasion des débats devant l'ONU ou l'OUA pour exposer sa thèse en termes juridiques, se trompe une nouvelle fois de forum. Elle croit pouvoir continuer devant la Cour les négociations qui, jadis, avaient été menées entre la France d'une part et l'Empire ottoman ou l'Italie d'autre part, sans jamais aboutir à une modification, parfois envisagée, de la frontière existante. Mais, Monsieur le Président, la Cour n'est ni un "marché aux territoires" ni un "tribunal de l'histoire" chargé d'effacer de prétendues injustices historiques.

2. Et à ce propos, Monsieur le Président, je voudrais insister sur un point crucial : si les conseils de la Libye ont probablement eu le sentiment de se livrer je dirais à un "baroud d'honneur", ils ne s'en sont pas moins employés à créer une "atmosphère". Je ne parle pas ici des conclusions libyennes, tellement extravagantes qu'elles en perdent toute crédibilité. Non. Plus grave me paraît être cette insinuation constante, que vient d'évoquer l'agent du Tchad, et selon laquelle le Tchad serait le défenseur obscurantiste de l'impérialisme colonial face à une Libye moderne, championne du droit des peuples — des peuples voisins, il est vrai — à disposer d'eux-mêmes.

Plus que d'autres, le Tchad a le sentiment d'avoir souffert du colonialisme et des injustices de

l'histoire — de cette histoire que la Libye interprète d'ailleurs très librement. Et tout au long de la préparation des écritures et des plaidoiries de cette affaire, nous avons ressenti l'arbitraire des partage coloniaux et le cynisme avec lequel une poignée de puissances européennes ont procédé au dépeçage répugnant du continent africain.

Monsieur le Président, on ne gomme pas l'histoire; le colonialisme ne peut pas être mis entre parenthèses. Dans leur sagesse, les peuples et les Etats d'Afrique ont pris acte de l'héritage.

C'est, comme l'a dit la Chambre de la Cour dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*

> "le besoin vital de stabilité pour survivre, se développer et consolider progressivement leur indépendance dans tous les domaines qui a amené les Etats africains à consentir au respect des frontières coloniales et à en tenir compte dans l'interprétation du principe de l'autodétermination des peuples" (*C.I.J. Recueil 1986*, p. 567, par. 25).

Le Tchad, assurément, n'approuve pas le passé — comment le pourrait-il lui qui en a tant souffert ! Mais il en prend acte lui aussi de même que le droit international en a pris acte en consacrant le principe de l'*uti possidetis* qui interdit la réouverture des "négociations judiciaires" auxquelles vous convie la Libye et qui aboutiraient à un nouveau partage aussi détestable que celui auquel ont procédé jadis la France, la Grande-Bretagne et l'Italie.

3. Nos contradicteurs "martèlent" plus qu'ils ne prouvent et espèrent susciter des "impressions" à défaut de pouvoir emporter la conviction.

L'impression, par exemple, que la Libye serait fille de la Senoussia et de l'Empire ottoman, alors que la première, la Senoussia, à l'implantation disséminée, discontinue, appartient au patrimoine religieux et culturel de tous les Musulmans et que le second, l'Empire ottoman, administrait la Tripolitaine et la Cyrénaïque comme deux entités distinctes en se désintéressant largement du Sahara.

L'impression qu'il a, de tout temps, existé un "peuple libyen" alors que, comme le Tchad, la Libye — sauf peut-être dans l'étroite bande côtière qui jouxte la Méditerranée — la Libye est issue d'un agrégat de tribus, souvent nomades et querelleuses, qui ont donné je dirais du "fil à retordre" aux Ottomans puis résisté fièrement, mais de façon souvent désordonnée, à l'avance italienne, de même d'ailleurs que les ethnies tchadiennes n'ont pas su s'unir face à la menace française.

L'impression aussi que les populations du nord du Tchad seraient, par décret divin, "indiscutablement libyennes", "unquestionably Libyan" (CR 93/144, p. 36). Ceci par glissements sémantiques successifs ; "les Senoussistes sont libyens" (déjà, cela se discute); "les tribus indigènes sont senoussistes" (elles ne le sont pas toutes, ni de la même manière); donc, "les tribus senoussistes sont libyennes" et tout ce que l'on peut attribuer au "peuple senoussiste" sert la cause libyenne — C.Q.F.D, ce qu'il fallait démontrer. D'où l'utilité, croit-on de multiplier les références à ce très mythique "peuple senoussiste", expression qui est revenue dix-huit fois dans la bouche du seul professeur Dolzer mardi dernier !

L'impression enfin — mais ce ne sont que des exemples — que la région revendiquée par la Libye est une sorte de *no man's land*, une *terra nullius* des temps modernes ou une "buffer zone" (CR 93/14, p. 33) dont on pourrait disposer pour des raisons géostratégiques, militaires, économiques, climatiques, que sais-je encore ? Des "raisons" en tout cas, Monsieur le Président, qui n'ont pas leur place dans cette enceinte.

4. Pour créer ces impressions, la Libye n'a pas lésiné sur les moyens. C'est son droit, même si le Tchad ne peut pas espérer la suivre sur ce terrain.

Nous avons lu des pièces de procédure magnifiquement illustrées de centaines de cartes en couleur "specially prepared for presentation to the International Court of Justice". Nous avons pu suivre des animations extrêmement bien faites, nous nous plaisons à le reconnaître, auxquelles il ne manquait que l'écran panoramique !

Mais tout ceci est trop conforme aux techniques modernes de la communication pour être pris à la légère. L'effet de masse est redoutable. A force de voir sur la carte la prétendue "strict southeast line" on finit par se demander si, finalement... A force de voire, sur ces mêmes cartes, des flèches rouges qui pointent vers Tejerhi ou In Ezzane sans aboutir à une quelconque ligne, on finit par avoir des doutes... N'y aurait-il vraiment pas de frontières ? Ni entre le Tchad et la Libye ? Ni entre le Tchad et la Libye ? Ni entre celle-ci et le Niger ou l'Algérie ? Certes, ce sont des "trucs"; mais après tout, ce qui fait vendre de la lessive ne risque-t-il pas de faire naître des idées ?

Et les "trucs" utilisés par la Libye ne sont pas seulement visuels. On les retrouve dans ses

écrits. Je n'en veux pour preuve que le mot "borderlands" dont M. Sohier nous a dit, le 16 juin, qu'il n'était que "a handy geographical term of reference" (CR 93/16, p. 12) sans pertinence juridique. Certes; mais ceci n'empêche pas la Libye d'en faire un *leitmotiv* tant dans ses écritures qu'en plaidoirie — sans doute dans le secret espoir de faire naître chez le lecteur, ou l'auditeur, la conviction (bien sûr erronée) qu'il existe bien, au nord du 15e parallèle, un territoire au statut juridique indéterminé que l'on pourrait partager "équitablement" entre les Parties.

En soi tout ceci n'est pas répréhensible. Mais est-ce justifié dans un débat judiciaire ? Vous êtes les juges, Messieurs de la Cour.

5. Le Tchad considère au demeurant que certains procédés utilisés par la Libye sont discutables.

Il lui paraît par exemple fort contestable, que la Libye ait reproduit entre les pages 112 et 113 de sa réplique une carte figurant à la page 2 de l'*Atlas géographique* qu'avait établie le Tchad après en avoir, semble-t-il, surchargé une ligne essentielle dans notre affaire — c'est la frontière de la Tripolitaine — et ceci sans le moindre avertissement. Peut-être la Libye entendait-elle ainsi échapper aux conclusions que vous ne manquerez pas de tirer de la légende cette carte, légende qu'au demeurant elle se garde bien de reproduire et qui indique nettement que la ligne qu'a retouchée la Libye — en tout cas qu'elle semble avoir retouchée — représente une "frontière coloniale" turque (*kolonialgrenzen*) ?

Par ailleurs, il est regrettable que la Libye ait cru pouvoir fonder une part importante de son argumentation sur un document (je parle de la lettre de Tombalbaye), dont elle dit avoir perdu l'original, alors même qu'à défaut d'original, elle eût pu, au moins, fournir une copie moins illisible que celle dont le Tchad dispose et qui n'est, elle-même, qu'une mauvaise reproduction du document remis par la Libye au sous-comité de l'OUA en 1987.

Nous reviendrons sur les conséquences juridiques qu'il convient de tirer de ces comportements, mais il nous a semblé convenable d'en faire état d'emblée.

b) *Plan des plaidoiries*

6. Monsieur le Président, en écoutant les conseils de la Libye, j'ai été frappé par le fait que ce

pays qui avait pourtant admis, dans ses écritures, que "it is clear that if the Court does find the existence of ... a conventionnal boundary, the Court will have resolved the dispute" (réplique, par. 3.66, p. 34; voir aussi par. 3.55, p. 30 ou contre-mémoire, par. 2.04, p. 28; par. 2.10 et 2.12, p. 31 ou par. 2.24, p. 36), que ce pays donc, malgré cela, s'ingénie, je dirais à "refuser l'obstacle" et à écarter, je ne dis pas d'un "revers de main" mais presque, les conventions et accords, pourtant nombreux, qui établissent — et de la manière la plus claire, bien plus claire qu'entre maint pays africains — le tracé de la frontière.

Je suis frappé aussi par un autre aspect des thèses libyennes. Alors qu'elle affirme qu'il n'existe pas de frontière et qu'il faut donc s'interroger sur le titre colonial pouvant fonder les conclusions de l'une et l'autre Parties, la Libye n'invoque, en réalité, aucun titre juridique, aucun; elle base toute sa fragile argumentation sur des "revendications", des "claims"— "senoussistes", ottomanes, italiennes, britanniques, que sais-je ? Mais Monsieur le Président, une *revendication* n'a jamais établi le moindre droit !

7. Monsieur le Président, la démarche que nous nous proposons de suivre est plus orthodoxe.

Après avoir brossé un tableau général des thèse juridiques des Parties, nous nous emploierons, dans un premier temps, à établir :

— *primo*, que le traité franco-libyen de 1955 identifie sans aucune ambiguïté, une ligne frontalière;

— *secundo*, que ce traité est en tous points compatible avec les décisions prises par les Nations Unies lorsque la Libye a accédé à l'indépendance, et

— *tertio*, que cette ligne peut, sans difficulté, être tracée par référence aux seuls instruments auxquels renvoie le traité de 1955.

Dans un deuxième temps, les conseils du Tchad montreront que, même si l'on faisait abstraction de ce traité fondamental et il n'y a aucune espèce de raison, à vrai dire, d'en faire abstraction — même dans ce cas, la même ligne serait opposable à la Libye du fait des mêmes instruments qu'aucun accord contraire n'a jamais privés de leur validité.

Dans un troisième temps, nous constaterons

— que le "titre originaire" invoqué par la Libye n'est pas pertinent et a été, de toutes manières,

supplanté par le titre colonial français;

— que cette ligne peut également être déduite des "effectivités" sur le terrain et de la cartographie;

— que le Tchad a succédé à la France et que cette succession a été reconnue par la Libye et les Nations Unies;

— tandis qu'à l'inverse les "ineffectivités libyennes" sont patentes si, du moins, l'on fait abstraction de l'occupation militaire de la bande d'Aozou, comme ceci a été reconnu également par l'OUA et aux Nations Unies.

Si nous avons le temps et si vous m'y autorisez, Monsieur le Président, je reviendrai pour récapituler brièvement l'argumentation du Tchad à la fin de ces plaidoiries.

Mais nous n'en sommes pas là. Commençons par le commencement. Et le commencement juridique — la fin aussi d'ailleurs — c'est le traité du 10 août 1955 entre la France et la Libye. Toutefois, avant que M. Jean-Pierre Cot aborde ce point capital, il nous a semblé nécessaire de présenter, dans son ensemble, la thèse du Tchad et les critiques fondamentales qu'elle comporte à l'encontre de l'argumentation libyenne; c'est ce que Mme Higgins fera dans quelques instants.

Auparavant, Monsieur le Président, je souhaite indiquer que, conformément à l'usage, les conseils du Tchad se proposent, avec votre autorisation, de ne pas donner expressément les références des citations qu'ils seront amenés à faire. Ces références seront communiquées au Greffe qui, j'en suis certain, acceptera avec son efficacité et sa courtoisie habituelles de les rétablir dans le texte des comptes rendus et nous l'en remercions bien vivement par avance.

Monsieur le Président, Messieurs les juges, je vous remercie de votre bienveillante attention et je vous prie de bien vouloir entendre Mme Higgins.

The PRESIDENT: Thank you, Professor Pellet. Professor Higgins.

Mrs. HIGGINS: Mr. President, Members of the Court, I am truly honoured to be appearing before you to make submissions on behalf of the Republic of Chad.

The Parties' Cases

1. Professor Bowett, in his opening remarks, explained, with a pleasing simplicity, Libya's case. There was, and never had been, a settled frontier with Chad; the Court could and should settle one now; and it should do so as a consequence of finding Libyan title down to the fifteenth parallel.

2. It is my purpose in these submissions to do three things; *first*, to show the Court that the claim of Libya as presented to the Court is completely inconsistent with what Libya has claimed over the years; and to suggest that the Court may properly draw certain conclusions from that. *Second*, to identify the dispute that Libya and Chad have together submitted to the Court. And, *third*, to state briefly Chad's constant and consistent position in the true dispute.

I. Libya's changing and incompatible positions

3. Libya has over the years advanced, and continues to advance, an array of inconsistent and incompatible positions. Before the Court the insistent theme has been that there has never been a settled frontier between Libya and Chad.

4. But the Court should be aware that Libya has, until August 1990, *always* accepted that there is an established frontier between Chad and itself. Sometimes its positions have been explicit, sometimes they are to be deduced from Libya's silences.

My colleague, Professor Franck, will take the Court through the evidence on these matters, but I may summarize the position here: There exists no statement by Libya upon independence that it still had an unsettled boundary nor that its boundary was other than that which France assumed to have remained operative in the face of the non-ratification of the Laval-Mussolini Treaty.

5. In February 1955 there occurred certain incidents in the Aozou strip (MC, paras. 108-114) which indicated that while Libya may have harboured certain designs over that area, it was prepared to acquiesce in the exercise of French territorial sovereignty.

6. During the negotiations with France for the Treaty of 1955 Libya renounced any claim to the BET — and did so in the context of accepting that the frontier was the one identified in the treaties of reference annexed to the text of the treaty being prepared (see Draft Minutes of 5 March 1955, Ann. 342). By the Treaty Libya confirmed the acceptance of the frontier as being the

line contained in those international instruments of reference. In 1956 Libya requested the actual demarcation of a section of its frontier with Algeria. It raised no issue about its frontier with Chad. Nor was any point raised about their common frontier when Chad, newly independent, applied for membership in the United Nations in 1960 (MC, p. 298).

7. In 1964 the OAU adopted its celebrated Cairo resolution, affirming the commitment to stability by accepting the colonial frontiers. Those States which regarded themselves as having disputed borders entered caveats or reservations: Libya felt no such need and voted for the resolution without explanation or qualification.

8. There followed a series of treaties with Chad. The terms of each of these assumes that the frontier between Libya and Chad had been definitively settled in 1955.

9. Thus, stopping for a moment to take a shapshot of Libya's position in the early 1970s, this is the picture that emerges: Libya knew that a frontier existed and made no contrary assertion — even when opportunity presented itself. Indeed, it had in 1955 explicitly accepted the 1899 line.

10. Mr. President, let me pause here to make the following point. Libya has endeavoured to explain its failure upon independence to query its frontiers as due to ignorance of everything save the Secretariat map. Professor Franck will explain how this picture does not accord with reality. In any event, it really must be a State's own responsibility at least to *ask*, upon becoming independent, where are my borders? Libya then seeks to explain away the 1955 Treaty by reliance again on Libyan ignorance, and on French deceit and trickery. Professor Cot will examine this more closely. But by 1964, when the celebrate *uti possidetis* resolution was adopted at the OAU, the reliance on ignorance and bewilderment is becoming a bit thin. Somehow other African countries, much poorer than Libya, have managed to check and query their boundaries upon independence; and several of them have in 1964 been perfectly able to raise their boundary concerns again in the context of the *uti possidetis* vote. They were not too ignorant, they were not too brow-beaten by the colonial powers, to do this.

11. The acceptance in the 1955 Treaty of the 1899 line did not preclude Libya from its military expansion into the Aozou strip in 1973. The initial position was to deny the occupation and

to insist that Libya had no claims in the Aouzou strip. But when the fact of the occupation became undeniable, Libya began again to invoke, albeit *indirectly*, the 1935 frontier line. Chad's Counter-Memorial (paras. 2.87-2.94) recounts the issuing of such maps in Libya in the mid 1970s; and the reference to the map annexed to the Pelt Report as "the true situation", an assertion made by the Libyan representative at the United Nations in March 1983; again by Libya in October 1985 in the General Assembly, and in January 1985 in the Security Council. Libyan maps of the period depicting the 1935 proposed treaty line may be seen in a series of maps that will be identified in the verbatim record (S3777, Map No. 87 and United Nations Maps 256, 256A and 256/rev.1).

12. Professor Franck will show the Court in some detail Libya's position on the matter of the frontier in the Organization of African Unity. I need merely say that Libya did not deny there that a frontier existed — it merely turned its back on the 1899 line which it had accepted, by its conduct and silences since 1950, and then explicitly in 1955.

13. Every one of the various organs of the OAU dealing with the dispute believed that Libya relied on the 1935 Treaty now to claim the Aouzou strip. There were a multitude of opportunities for Libya to deny that this was its position. Indeed, it owed a duty to the OAU not to let laborious and time-consuming work proceed on an incorrect assumption. But Libya issued no denial.

Throughout all the meetings of the *Comité ad hoc*, and the Sub-Committee of Experts established by the OAU, Libya did not once deny that a frontier existed. At first there was non-co-operation. We heard with interest from Professor Cahier that the reason for Libya's refusal to co-operate and state its position was the civil war in Chad (CR 93/18, p. 50). Chad, somehow, managed to participate fully and elaborate its position. Non-co-operation was followed by intermittent participation in OAU efforts at peaceful settlement. The OAU organs — the Commission, the Sub-Committee and the Committee of Experts, all proceeded on the assumption that the dispute was about the Aouzou strip and Libya's claim was to the 1935 line. The full details are recalled in Chad's Counter-Memorial (at 2.23-2.47). It is clear, as Chad there shows, that these bodies were operating on the basis of information from Libya, which led them to believe that Libya relied on the 1935 Treaty now to claim the Aouzou strip. The Sub-Committee issued its two Reports

on this basis. It made clear that it had been addressing "des implications de la présence de la Libye sur la bande d'Aouzou" and the claims of the parties in respect of that. Libya issued no denial — just as it had not protested at the characterization by the OAU in resolution 106 (XIX), a few years earlier, of the situation as one "regarding the Tibesti region".

14. Mr. President, taking our next snapshot at 1989, we may say that Libya continued to assume the existence of a frontier, but now — ignoring its past position and its own undertakings in the 1955 Treaty — it relied on the 1935 line to justify its occupation of the Aouzou strip.

15. But by 1990, when it came to the Court, Libya's position had changed yet again. It was now clearly denying that the frontier was definitively determined by the 1955 Treaty.

16. Moreover, the 1935 Treaty had now served its purpose, and it too could be cast aside. It had for a period of years provided at least a minimalist fig leaf for the military occupation of the Aouzou strip. But the next stage — the litigation before the Court — required something better than an unratified treaty as the basis of the claim. The claim would rather be that there exists no frontier at all, but that Libya is entitled to half of Chad. No matter that the existence of the frontier had never been denied by Libya either at the United Nations or the OAU. No matter that Libya had never made any claim beyond the Aouzou strip. Some reasons would be found to explain away the legal relevance of its past conduct and to support this massive, totally new territorial claim.

17. It is not difficult to imagine how all of this must have come about. In 1989 the decision had been taken, in the *Accord-Cadre* of that year, to refer the matter to the Court if no political agreement could be reached. It was now clearly time for Libya to start thinking about how it could fashion its arguments in international law, and inventive minds would no doubt be put to the task. The problems were not inconsiderable. One can imagine the discussions! "To begin with, how will we deal with the uncomfortable problem that the 1955 Treaty, to which Libya is a party, clearly identifies a line by reference to specified instruments? Well, we will have to say that the international instruments annexed to the Exchange of Letters under the Treaty were not in force on the day of Libyan independence. And we will just have to gloss over the fact that that makes their inclusion in the Treaty pointless. And then it won't hurt to throw doubt on the 1955 Treaty itself,

without actually declaring it invalid — to suggest that it was in some way tainted, imposed on Libya, that it represents a sort of colonialism."

18. "But where will that leave the frontier? The Court will still surely look at the Franco-British Convention of 1898, the associated Declaration of 1899, the Franco-Italian Agreements of 1902, the Convention between the French Republic and the Ottoman Empire of 1910, the Franco-British Convention of 1919, and the Franco-Italian arrangement of 1919. And don't those show agreement upon a certain line between France and Britain, and its acceptance by those through whom Libya necessarily claims?" And again, one can imagine that legal creativity suggested a certain reply: "we will say that the line was but a colonial delimitation of spheres of influence and was never an international frontier. And we had best ignore the Italian acceptance of the line or somehow propose that it didn't have a significance for Libya, years later."

19. "But what shall we say about the fact that France exercised certain *effectivités* up to that frontier line, as did Chad in turn until we occupied the Aozou strip? Well, our best tactic will be somehow to insist that, even in the period 1898-1919, these French *effectivités* were illegal. We can say they were an unlawful use of force against the peoples of the area, and that no title could flow from such acts. We may even try to read the 1955 Treaty as excluding *effectivités*. And as for the Chad *effectivités*, we will minimize these."

20. One can then imagine how the discussion developed: "But we don't have *effectivités* on which we can really rely. In any event, over the years we have always relied on the 1935 Laval-Mussolini Treaty line as the basis of our claim. But aren't there problems about its non-ratification? How will we deal with *that*?"

"Well, that *is* difficult. We have somehow to liberate ourselves from this unpromising claim tied to the unratified 1935 Treaty. Let us be really imaginative and say that there is no frontier at all. And that can have the advantage of allowing us to make very significant claims, on entirely different grounds, over other Chad territory, not tied even to the Aozou strip. Indeed, let's all avoid a reference to the Aozou strip whenever you can. Let's find a term to cover half of Chad. 'Borderlands' has just the right nuance . . ."

21. But there still remained the problem of consistency. If Libya was to adopt this new claim of no existing frontier, and an entitlement to half of Chad, how were certain things to be explained? What was to be said about the failure to note the absence of a frontier during the extended process of decolonization? (MC, 233-4.) How was it to be explained that Libya never suggested in the United Nations, at the time of its independence, that it regarded its frontier with Chad as never having been settled? (MC, paras. 2.40-241.) Why was the absence of a settled frontier not mentioned at the time of Chad's independence? (MC, paras. 4.56-4.58.) How was its failure to explain any of this at the time of the 1955 Treaty to be explained? And what was to be said about its silence at the OAU Cairo Conference of 1964, when others who thought they still had an unresolved border problem carefully entered caveats to their acceptance of the *uti possidetis* principle? (MC, paras. 4.59 ff.) And, above all, what about the ready reliance (when any legal arguments were made at all) upon the 1935 line as justifying the occupation of the Aozou strip? (SC debates: MC, paras. 36-7; OAU 1977, *ibid.*, 2.30.) How could all of these difficulties be made consistent with the claim as it was *now* to be formulated?

22. The agreed tactic on this dilemma was revealed in the Libyan Counter-Memorial. It was to be argued that only what was said before the Court was relevant. Everything else was to be characterized as "political", and therefore of no consequence. What had been said elsewhere, over the years, was thus simply to be ignored, expunged from the record. Like that, the Court would have its direction focused on the claim as formulated in Libya's written pleadings, and invited to treat the problems of inconsistency as an irrelevance.

23. Chad has responded to this tactic in its Reply (pp. 10-18) but certain points may perhaps be usefully elaborated. There is no basis for the suggestion that legal consequences are not relevant before non-judicial bodies such as the Security Council or the General Assembly or the OAU. It is a well-established practice within such bodies for States to explain their legal positions on a given dispute, albeit in a broad and untechnical fashion, alongside the deployment of their political arguments.

24. It is disingenuous for Libya to claim that its "true" legal claims have been reserved for the

Court, a judicial organ — and that its silences or contradictory assertions in other bodies may thus simply be disregarded. Indeed, the Court has routinely examined statements made by States before political bodies, including those charged with leading territories to independence. Thus in its Judgment of 26 June 1992 in the *Nauru* case the Court examined the declarations made before United Nations organs by the representatives of the trusteeship powers and by the representatives of the peoples of the territory (*Certain Phosphate Lands in Nauru* case, 1992, paras. 15-20). How strange it would have been for Nauru — or indeed Australia — to seek to exclude the relevance of those earlier positions taken, or significant silences, by declaring that they had not yet been articulated before a judicial body.

The Court adjourned from 11.18 to 11.35 a.m.

The PRESIDENT: Professor Higgins.

Mrs. HIGGINS:

25. There is no disagreement, it seems, between Chad and Libya as to the constituent elements of acquiescence. The jurisprudence of this Court and the Permanent Court, cited by Professor Cahier (CR 93/18, pp. 54-55), is exactly pertinent and I shall not go over the same ground. Whether by reference to the terms in *Eastern Greenland* case, or the *Arbitration of the King of Spain*, or the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 305), Libya has accepted a frontier line. Through its silence in the 1951 to 1956 period, Libya has failed to deny that a frontier existed, or that it was a frontier other than that following the 1899 line. Libya was recognizing an existing reality — namely, that its southern frontier was long since settled. The silences, at various critical times, manifested a natural acceptance of a matter long determined in fact and in law.

26. Through its acts Libya then embraced the 1935 line — through the invocation of an incorrect United Nations map showing this line, through the circulation in the 1970s and 1980s of maps showing this line and the constant reiteration up to the 1980s of its reliance on the line shown. (See CMC, Vol. II, Atlas Cartographique, Maps Nos. 148, 150 and 162.)

27. Having ignored the 1955 Treaty line in favour of a resumption of claims based on the 1935 line, Libya cannot now be permitted to go back on *that* claim too. The reliance on maps based on the 1935 line represents a considered view of Libya's position: this was not a representation that, to use the words of the Chamber in the *Frontier Dispute* case (*I.C.J. Reports 1986*, p. 573) was a casual comment "of the kind regularly uttered at press conferences", and thus of no legal significance. Moreover, the failure of Libya to correct all the work of the OAU which was based on that body's belief that Libya's case rested on the 1935 line was deliberate and amounted to a representation that engaged Libya within the sense of the *North Sea Continental Shelf* case (*I.C.J. Reports 1969*, p. 21).

28. Libya has been very selective in the history it has brought before the Court. Some historical facts are best forgotten, removed from the view of the Court. Libya has sought to do this by insisting — as Professor Cahier put it (CR 93/18, p. 50) that the dossier was not "véritablement

complété qu'à partie de la saisine de la Cour".

29. Italy did sometimes claim that the frontier was unsettled, as certain maps of the period show. But before 1991 Libya had either accepted the 1955 Treaty or claimed the 1935 line. Since independence in 1951 there has never been — not in public declarations, not in the diplomatic archives, not in a single map — a single evidence that Libya had no frontier or that she claimed the old Ottoman territories. Today's claims by Libya, in this Court, of the absence of a frontier, requires the course of diplomatic history to be ignored, documents to be misread and the normal evidences of international law (*preuves*) to be treated as if they don't matter.

30. Libya in its notification to the Court of 31 August 1990 stated, for the first time, that none of the agreements that had been made finally fixed the boundary between the Parties, which accordingly *remains* to be established. The particular observation was immediately challenged by Chad on 28 September 1990 in a further communication to the Court. Thus Chad did not wait until the opening of the written pleadings to deploy its views, believing it should immediately indicate to the Court what it believed to be the scope of the dispute submitted to it.

31. The second tactic to deal with the problem of Libyan inconsistencies has been saved for the oral pleadings.

32. Mr. President, Members of the Court, we heard some remarkable arguments of law from Libya concerning a topic which I have to say is somewhat unfamiliar to counsel for Chad: succession to acquiescence. Sir Ian Sinclair developed, at considerable length, a thesis which I may summarize thus: any Italian acquiescence in 1902 to a recognition of the 1899 line has no legal significance for Libya. This is because acquiescence, or estoppels arising from it, can only be invocable *inter partes*. This argument was supported by reliance on the jurisprudence of the Court and on the Vienna Convention on the Law of Treaties. From this Libya deduced:

> "good faith demands that a successor State should not be saddled with the adverse consequences of the conduct of its predecessor State" (CR 93/18, p. 20).

Mr. President, Members of the Court, I fear that throughout history successor States have been saddled with adverse consequences of their predecessor States. It is intriguing to hear that there is now a rule of international law that will allow the Court to go back over all such complaints and

grievances since time immemorial.

33. Counsel for Libya also asked:

> "By what magic can the conduct of Italy at any time between 1900 and 1951 be attributed to an independent Libya?" (CR 93/18, p. 21.)

And that Italian conduct prior to 1951 cannot "support a claim that Libya must be presumed to have acquiesced in the so-called 1919 line as the boundary between Libya and what is now Chad."

34. This is, of course, all a total non-issue. There is no suggestion by Chad of Libyan "succession to acquiescence". The short point is that a successor State only succeeds to what its predecessor had. Put the other way around, the colonial State can only pass on such titles and boundaries as it has. *Nemo dat quod non habet.*

35. What can an insistence by a State that it is not bound by the adverse acts of its predecessor achieve? It can only operate to preserve its *rights*. But its frontier rights are exactly a product of what has gone before. There are not mythical "true" frontiers, or even territorial titles, that exist in disregard of the historical and legal events that led to them.

36. Quite simply, what Libya has succeeded to is not Italy's acquiescence, but a frontier. Italy's acquiescence is relevant to what frontier line it could pass on.

II. The real subject of the dispute

37. Chad, having every reason to believe that Libya had resiled from its 1955 Treaty obligations and was now asserting an entitlement to a frontier in conformity with the 1935 line, agreed to resolve the dispute peacefully by referring the matter to the Court. In July 1990 the OAU in resolution 200 (XXVI) invited the parties "to pursue their contacts with a view to reaching a settlement of their dispute as soon as possible". The only dispute that existed at that time was a dispute about whether Libya could justify its military presence in the Aozou region on the basis of the 1935 line.

38. The *Accord-Cadre* of 1989 made reference to the earlier resolution 6 (XXV), which later became resolution 184 (XXV), on the Libya-Chad dispute. The dispute between the two parties was to be settled by political means within a year, or then to be submitted to the Court. Again, the only

dispute existing between the Parties was as to whether the frontier lay upon the 1899 line, confirmed in the 1955 Treaty, or along the 1935 line, as Libya once again was contending.

39. It is well established in the jurisprudence of the Court that for a dispute to exist within the meaning of Article 36 of the Statute, claims must have been made, and in turn rebutted, by each of the parties.

40. The interesting point here is the confluence of the law as it concerns disputes and the law as it concerns acquiescence. The Chamber of the Court, in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (*I.C.J. Reports 1992*, p. 406, para. 73) spoke of "the parties to a dispute, having each advanced their contentions in principle, which thus define the extent of the dispute" — a procedure in which one Party has notably failed to engage in this case. And the Chamber continued:

> "in 1881 and 1884, the extent of the dispute was simply to determine where was the limit between the Citalá and the Ocotepeque lands. It was the common understanding that that limit was also the international frontier . . . the Chamber is entitled to take account of the shared view in 1881 and 1884 of the Parties as to the basis and extent of their dispute."

41. Chad submits that the Court is entitled to take into account what was the shared view of the Parties from the early 1970s until 1990 — namely, that the basis of their dispute was whether the 1899 or the 1935 lines marked the Libya-Chad frontier, and that the territorial extent of the dispute was confined to the Aouzou strip.

42. The dispute the Court was asked to resolve is the dispute as it was understood by the Parties at the time of the *Accord-Cadre*. Never having made any claim to Chad territory beyond what lay south of the 1935 line, never having claimed half of Chad in all the dozens of times the issue was discussed in the United Nations, the OAU or bilaterally, no dispute existed as to anything other than where the frontier was to be drawn in relation to the Aozou strip. A legal claim does not exist *in vacuo*. It is a claim in relation to an existing dispute — that is to say, in relation to positions already taken and in respect of which it has not been possible to reach an agreement. A legal claim is not a mere assertion before the International Court, never previously heard, without any prior history.

43. Mr. President, Members of the Court, the great difficulty in analysing matters in this case is that it is not a single prior recognition from which Libya seeks to resile. It is rather than the entire affair has been characterized by inconsistencies and former positions gone back upon. Where a position is changed once, an issue of acquiescence or estoppel may arise. But where positions are changed so frequently — the last time being between the *Accord-Cadre* and the formulation of the case before the Court — then this necessarily affects the credibility of the entirety of the arguments put. The probity of the case is put in issue and we would ask the Court to draw its own conclusions from the inconsistencies.

44. Libya has offered various responses in its Reply (pp. 19 ff.). Libya sought to turn this challenge by Chad into a challenge of the Court's competence (pp. 22-24). It was, of course, nothing of the kind. The Court is entirely competent to decide the dispute before it — and will itself decide whether this dispute is about whether an existing frontier runs along the 1899 or 1935 line, or whether it is really about whether there is a frontier at all and whether half of independent Chad belongs to Libya. The issue is not the Court's competence, but Libya's inconsistencies.

Last week Professor Bowett came at it differently. Having not taken the opportunity to challenge the Court's jurisdiction, he said "Chad should not be allowed the same result as if it had" (CR 93/14, pp. 36-37). So the Court should not be persuaded that the real dispute is over the Aozou because Chad has failed to challenge the Court's jurisdiction. Well, the demands of litigation strategy generate an interesting logic.

45. Libya contends further that the debates before the OAU and the United Nations and statements of Libya's representatives have no bearing on this. All that is irrelevant, apparently, because what is relevant are the negotiations leading up to the *Accord-Cadre*,

> "and they do not contain reliable information allowing the intention of the parties to be established at the moment they adopted the *Accord-Cadre*'s text" (pp. 19-20).

The cynicism of this argument is apparent. It really is for Libya to show that, notwithstanding all the prior history of the dispute, the Parties, in concluding the *Accord-Cadre*, were deciding to resolve a different dispute over whether there was a frontier or not and whether Libya was entitled to half of Chad or not. And of course it cannot.

46. Nor does Libya's attempt to rely on the wording of the *Accord-Cadre* alone resolve the matter. The *Accord-Cadre*, in Article 1, refers to the settlement of "their territorial dispute". The same phrase is used in Article 2. The dispute had been exacerbated by Libya's military occupation of the Aozou strip; and by its refusal to co-operate in the processes of the OAU by articulating clearly the legal basis of its occupation. That combination of factors no doubt led to the convenient term "their territorial dispute" being used in the *Accord-Cadre*. Libya asserts in its Reply that *ratione materiae* the competence of the Court is not subject in the *Accord-Cadre* to any limitation as to the geographic extent of the territory which may be claimed by one Party (RL, para. 3.52). But it misses the point, of course. The role of the Court, whether generally or under the *Accord-Cadre*, is not to respond to no matter what *claims* are made by the Parties; it is to determine the law on the dispute that has been referred to it. The subject-matter of the dispute cannot be altered or indeed determined by the claims made by one party before the Court. The mere fact that the words "territorial dispute" are used in the compromis, without any geographic limitation, does not mean that there has been brought to the Court for resolution *any* territorial claim, made unilaterally by one party, whether or not it had been the subject of the dispute in respect of which the parties agreed to litigate. But this is what Professor Bowett proposed in terms to you. So in his analysis, Chad under the *Accord-Cadre* would be entitled to formulate, for the first time, a claim to Libyan territory up to Koufra or Djaraboub (remembering, of course, to call the area the "Chad-Libya borderlands"). I suspect that Libya might have something to say to you on that, Mr. President.

47. Nor can this result be achieved by seeking to isolate the *Accord-Cadre* from the diplomatic history of the matter and to rely on the "ordinary meaning" of that agreement. First, there is nothing in the text of the *Accord-Cadre at all* to suggest, as Libya asserts in its Reply (3.12) that "the dispute concerns the ownership of a 'region' by one or the other of the Parties". There are merely three passing references, undefined, as to "their territorial dispute".

48. And it was Chad itself which, in its Memorial, fully acknowledged that frontier disputes necessarily entailed the attribution of certain portions of territory, citing what the Court and its Chamber have said on this in the *Aegean Sea Continental Shelf* case and the *Frontier Dispute* case

(*I.C.J. Reports 1978*, p. 35; *I.C.J. Reports 1986*, p. 563; MC, p. 35).

49. But this striking truth neither eliminates important legal distinctions between frontier and territorial disputes; nor does it turn a frontier dispute which necessarily determines a certain portion of territory into a dispute over *any* claim to *any* territory that one party may care to advance when it gets to Court.

50. Nor is Libya helped by insisting that there has to be reliance only on the text of the *Accord-Cadre* and that the *travaux préparatoires* may not, by virtue of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, be used "to modify the clear result pointed to by the ordinary meaning of the text in context". The ordinary meaning of the phrase "their territorial dispute" does not of itself define what that dispute *is*. What we can say is that it is not a dispute on a claim never yet advanced by one party. To understand what "their territorial dispute" refers to in context, one has to look to the history of the dispute. And it is absolutely clear that the dispute was about Libya's on-off-on claims that its southern boundary ran along the 1935 line, with the consequence that it claimed also the territory of Aozou strip; and Chad's rejection of that claim, primarily on the basis of the 1955 Treaty.

51. Professor Bowett, in oral argument, told you that interpretation by reference to context also would not allow anything outside the Agreement itself to be before the Court. I will not follow him through the Vienna Convention on the Law of Treaties, the *Rights of Nationals in Morocco* case and the *Beagle Channel* case. I will merely note how nervous Libya is lest the Court should look at the larger context to identify the real dispute, and at Libya's inconsistent behaviour. And I will note the absence of anything to support the assertion that "context" precludes what went on outside the conference room where the Treaty was reached.

Because the word "dispute" appears in a treaty, the Court is not precluded from the application of its normal judicial criteria to identify just what the dispute *is*.

52. So we have a dispute about alternative frontiers which necessarily entails a territorial element too. We do not have a dispute over vast tracts of territory, the resolution of title to which will allow the Court to draw a frontier.

53. What is the role of equity in all this? Chad's views on equity are to be understood by reference to the three complementary strands to its case. The first strand is that the 1955 Treaty determines the matter as between Libya and Chad. A frontier is affirmed by reference to a line in other earlier instruments. The second is that those instruments autonomously settle a frontier that is opposable to the present parties. Mr. President, Members of the Court, if either of these is right, there is no room for equitable considerations to come into play. This is not because we are "frightened" of equity, or because, as has been put to you, Chad "scorns" the Court's jurisprudence. The point is simply that made by the Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, namely that

> "to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the grounds of considerations of equity." (*I.C.J. Reports 1986*, p. 633.)

54. Considerations of equity would only come into play at all in two circumstances. The first is that a frontier line exists, but contains some gaps which require "filling in". Neither Libya nor Chad claim this to be the position and we can put it to one side. The second possibility is Libya's main thesis — that no frontier has ever existed and the Court must determine it now, for the first time. Then, and only then, would equitable considerations be in play. Or would they, *even* then?

55. Let us address Libya's hypothesis, profoundly wrong though we believe it to be. There are two questions for the Court: what would the role of equity be in these circumstances? And what factors should then be taken into play as equity? Let us take them each in turn.

56. The role of equity in terrestrial delimitation should be very limited and circumscribed. It is no coincidence that the concept of equitable considerations has been most developed in maritime delimitation. In such cases the task before the Court, of determining whose claim is well founded, is preliminary to the real task of allocating resources between claimants. As the Court has pointed out in its jurisprudence on more than one occasion, there are no prescribed rules to apply to this task. Further, it is in the nature of shelf delimitation that each side has to have something. The seeds of compromise are already there.

57. By contrast, there is no absence of specific rules for the conferring of territorial title. We know both what the precise rules are and what must be shown to make them applicable to the case in hand. The more detailed the substantive law, the smaller the role for equitable factors.

58. The only other function of equitable considerations, beyond assisting in the allocation of resources where there are a few detailed rules, is to soften the application of the law: what Strupp prefers to as "l'adoucissement de la rigueur du droit" (Strupp "Le droit du juge international de statuer selon l'équité," 33 *Recueil des Cours* (1930) Vol. III at p. 462). If Libya has no territorial title to the Aozou strip, never having met the international law criteria for the establishment of title there, why should it be able to invoke so called equitable considerations to soften the consequences of that requirement of international law?

59. What Chad accepts is that, once territorial title is established, equitable factors may assist in delimiting the frontier (though even that, as I shall elaborate in a moment, is limited). But what Libya can't do *at all* is to invoke such factors as ethnicity, the economy, security, geography, as equitable factors that will assist in showing a *territorial title*.

60. And what of the drawing of a frontier, if Libya could show title over half of Chad, approximately down to the 15° parallel (which it has to do without benefit of equity)? We now come, Mr. President, to the second question I said required an answer. Anxious not to impose beyond what is necessary on the Court's time, I would say only that this aspect is fully answered by Chad in its Counter-Memorial, at pages 379-384. We show there, citing the relevant case law (including, notably, the *Western Sahara* case, the *Island of Palmas* case and the *Guatemala and Honduras Arbitration*) that boundaries are not to be drawn by reference to "natural boundaries," nor to divisions of national geography within a region, nor to similarity of geography between regions in the part of one State and the geography of an adjoining State, nor to the religion or ethnicity of the residents in the area proposed for the frontier, nor to economic dependence. In particular, the suggestion of Libya, repeated only this week, that its security concerns should be taken into account in according it territorial title, is extraordinary. Professor Bowett told you that

> "it is not that, today, Libya fears an attack by Chad . . . But there may be other Powers that might in the future see Libya as vulnerable to an attack from the south — an attack that would lead into the Libyan oil fields and the Libyan water basins." (CR 93/20,

p. 77.)

On such unsubstantiated speculations about the future, Mr. President, the Court is invited to afford territorial title to Libya.

61. This does not deny a role — a small role — to equitable factors in the delimitation of frontiers. That role is exemplified in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case of 1986 and in the *Rann of Kutch Award* (50 *ILR* (1968) 2). In each of these cases equity had a role to play in filling gaps *along an existing frontier line* — the pool of Soum in the former, and the inlets at Nagar Parkar in the latter.

62. But one cannot delimit an entire boundary by reliance on such factors. Boundaries exist as a result of treaty delimitation or exercises of effective sovereignty up to certain specified points: equity can assist in filling in the unclear portions of such a line, not in creating the line *de novo*.

63. The true purpose of Libya's massive claim to half of Chad, and its insistence that the case is about title to territory and not the identification of an existing frontier, was confirmed by Professor Condorelli last Tuesday to be exactly what Chad had suggested in its Counter-Memorial. To get half of Chad would be splendid, but really Libya would be satisfied with everything north of the 1935 line. That line could not be argued for as such, because of the non-ratification of that Treaty. So the dispute would be turned into one about territory rather than frontiers, large territorial claims would be made, and then on the very last day of the oral argument Libya would reinsert the 1935 line *as a species of equity*.

64. Never mind that the Rome Treaty line is at least 800 kilometres away from the frontier formally claimed on the 15th parallel. Libya will still say as it did

> "les accords de Rome [sont] d'importantes indications quant à la délimitation que vous devez effectuer ... au minimum, les territoires situés au nord de la ligne de 1935 doivent être reconnus comme appartenant incontestablement à la Libye" (CR 93/20, p. 50).

Now, recognizing the problem of arguing at one and the same time for the 15th parallel and the 1935 line, Libya then casually adds, on the basis of nothing at all, that

> "Ces accords suggèrent également (mais sans donner ici des indications précises) que certains des territoires au sud de cette ligne doivent aussi être considérés comme étant dans la même situation juridique".

Mr. President, the wallpaper has been pulled away from the cracks in the litigation strategy.

65. To get back from the 15th parallel to the 1935 line Libya takes two steps. The first is to insist that in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case and in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case the Chambers of the Court used unratified treaties as equitable considerations relevant to the determining of a boundary. In each of these cases, it is true, the Chambers made due note of an unratified treaty, not to determine the boundary but to fill a gap on the line. But, Mr. President, there was also a key difference between using these unratified treaties even in that modest sense, and the reliance on the 1935 Rome Treaty that Libya claims as an equitable factor. All that happened in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case was that the agreement had never been approved by the competent authorities. And in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case the Chamber said (*I.C.J. Reports 1992*, p. 422, para. 100) that "while the Government of El Salvador did not ratify the terms which had been agreed *ad referendum* by its representatives, neither did it denounce them". Mr. President, one can contrast this with the status of the unratified Treaty of 1935, which is in no way comparable. I refer you to the note of the Italian Foreign Minister, formally denouncing the 1935 Treaty. It is to be found in Annex 266 of Chad's Memorial. Libya's on-off approach to the 1935 Treaty is manipulative (it's our frontier — we have no frontier; it's not our frontier by law but it's the frontier we'll be pleased to accept by equity).

66. Having tried to use an unratified treaty as an equitable factor, Libya's second step is to invoke, also as an equitable factor, Article 13 of the Treaty of London of 1915. Mr. President, Chad will make its substantive arguments in due course on the relationship between Article 13 of 1915, and the Peace Treaty of 1947. I merely observe that everything that goes out the front door on the application of the rules of international law on treaties, comes in the back door marked "equity". That is not the function of equity. As we have shown, its function is to assist only where there are only rules in outline (as in maritime delimitation), or to soften the rigours of the rule in application. Equity does not provide you with exactly what you are not entitled to by the application of the rules

of international law.

67. There is one further point: "he who seeks equity must do equity". Is Libya, which has blown so hot and cold, really entitled to invoke equity in this Court?

68. Finally, a further remarkable claim was made for the role of equity. We were told "l'équité demande — la Libye en est convaincue — qu'un équilibre satisfaisant soit trouvé quant au poids de l'héritage colonial que la Libye et le Tchad sont appelés à porter" (CR 93/20, p. 55). And we had already heard that the Chad approach was "unbalanced" (*ibid.*). Two small points: the first is that the "burden" Libya is required to bear from the colonial heritage is that it has not succeeded upon independence to the territory of Chad. A curious "burden"! Second, no matter how much Libya may have indignantly denied it during its oral argument, this really is equity *contra legem*, the very use of equity for redistributive purposes, or the so-called "distributive justice", that the Court has firmly rejected in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (*I.C.J. Reports 1982*, para. 71) and in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case (*I.C.J. Reports 1985*, para. 46). Now these were of course in the context of maritime delimitations but *a fortiori*, therefore, in terrestrial delimitation.

69. Even if Libya had title; even if she had a plausible frontier to offer; even if there was a gap in the frontier that needed filling — even then the 1935 line could not be used to give the Aouzou strip to Libya.

70. Finally, Mr. President, I conclude this section where I began. The whole matter does not in fact arise, as the frontier is delimited by the 1955 Treaty.

III. Chad's case: a consistent claim

71. And that brings me to my final remarks on the Third Section, Chad's case which we say is a consistent claim. The position of the Republic of Chad is constant and clear. Chad says that the course of the frontier is determined by the Treaty of 1955 — a treaty of continuing application between the Parties. The Treaty of 1955 defined the line of the frontier by reference to a line resulting from international instruments annexed to the 1955 Treaty.

72. This is Chad's position. The question of where the frontier lies between Chad and Libya

can be disposed of by a confirmation by the Court that the 1955 Treaty *is* to be applied. At the same time, Chad has also shown that even if the matter before the Court were to be approached from different perspectives, and by different routes, the outcome still remains the same: the frontier lies along the line indicated by Chad to the Court.

73. What might these arguments in the alternative be, should for any reason Chad's primary contention — that the 1955 Treaty is determinative — be rejected? Even *without* the acceptance of the line referred to in those earlier instruments in 1955, the provisions of those agreements remain before the Court. The provision of these instruments — including the line that they specify, are binding upon Chad as the successor to France, and are opposable to Libya as the successor to Italy. And because these provisions refer to and describe the frontier line, that line constitutes in any event the frontier between Chad and Libya. The meaning of Article 3 of the Declaration of 1899 taken by itself may have been ambiguous. But its meaning can be understood by reference to the *travaux préparatoires*, by the failure of the British to protest the map appended by the French to the Convention of 1899, and by placing the article in the context of what the parties were seeking to achieve. Moreover, by the Franco-Italian Treaty of 1902 Italy accepted the frontiers of Tripolitania as marked on the map and a possible extension of French influence up to this frontier. The Franco-British Convention of 1919 confirmed the course of the line, setting forth in writing what they had agreed in 1899, and had been accepted by Italy in 1902 on the basis of the map. A line that had originally been drawn up to delimit the spheres of influence of Britain and France had, by 1919, become an international frontier, as France had by then exercised sovereign authority up to the boundary of the sphere of influence agreed with Great Britain in 1899.

74. The point is this: the frontier line specified in these international instruments delineates the frontier — primarily because this is the line designated in the 1955 Treaty between France and Libya, but also because these earlier instruments are in any event autonomously compelling upon Chad and Libya. This second, alternative line of argument is elaborated in Chapter IV of Chad's Memorial and in 5.1 of Chapter 8 of Chad's Counter-Memorial. Chad elaborated this secondary argument further in Chapter II of its Reply.

75. The further alternative approach would come into consideration only if the Court thought that the 1955 Treaty did not dispose of the matter *and* that the instruments referred to therein — and the line they determine — were not opposable to Chad and to Libya as successors to France and to Italy. Chad contends that in those circumstances the frontier still runs along the same line. The line agreed in 1899 and described in words in 1919 marks the line up to which France established an effective presence. It established it, as Professor Cassese will later show, with military occupation and then with a civil administration. That title — a perfectly legal one under the law of the time — was passed to Chad. It thus marks the line up to which Chad could and did exercise its authority after independence, engaging in a variety of sovereign acts in relation to that territory until prevented by Libyan military occupation. The third Chad argument in the alternative is elaborated in Chapter V of its Memorial, especially at pp. 214-256; and Chapter VI at pp. 271-295. It is addressed further in the Counter-Memorial in Chapter 9; and in the Reply, Chapter IV.

76. Chad's view has been that, whatever the legal approach adopted, the frontier line is the same: the line resulting, whether from the instruments of reference annexed to the 1955 Treaty, or from those instruments as an autonomous source of obligation, or as the border of the territory over which sovereignty had been exercised. And far from being "curious", as various Libyan counsel suggested, colonial history and the facts make it entirely understandable that the line is the same, whichever route of argument one takes. And nor of course is there any substance to the anxious insistence by Libya that these subsidiary but consistent lines of argument evidenced a lack of confidence in our main thesis. But a treaty is a treaty and Chad's central thesis remains the one always advanced: that the Court need go no further than the 1955 Treaty to see what Libya has agreed to as to where the boundary runs.

77. This line has been advanced with unbroken constancy by France, and then by Chad, from the moment it was determined in 1899 down to the present day. Throughout the period 1899 to 1919, when so much was being played for in Africa, France insisted with constancy that this line, and no other, marked first the outer limit of its sphere of influence and then its international frontier.

78. Mr. President, Members of the Court, it was been suggested at various moments in the

Libyan oral pleadings that certain archival materials show that there was no agreed frontier. You heard from Professor Condorelli that a belatedly introduced press communiqué issued after the 1934 Treaty between Britain and Italy referred to the frontier as "still to be fixed" (CR 93/17, p. 40; Eng. trans., p. 28); and that M. Guariglia, commenting on the School Map of 1930, stated that "the frontiers . . . have not yet been internationally delimited" (*ibid.*, pp. 52-53; Eng. trans., p. 39). And Sir Ian Sinclair made much of a reference in the French archives to an unused draft which referred to future possible "delimitation on the ground".

It hardly needs saying — but for prudence I will say it — that delimitation and demarcation are two different concepts. Demarcation is, of course, delimitation on the ground. But statesmen and civil servants know nothing of these refinements — and, indeed, often use the terms loosely and interchangeably, as do sometimes lawyers too. All that the instances I have referred to show us is that demarcation — the marking of the boundary on the ground — had never happened and has yet to happen. And this is why French officials seemed sometimes to accept that the frontier was not yet "delimited", while in fact what they had in mind was that it had not been demarcated on the ground.

79. With the failure of the 1935 Treaty the frontier remained where it had always been.

80. In the 1955 Treaty France once again reaffirmed the same line. Since independence, Chad has always believed its frontier to be along the same line and behaved consistently with that belief. The 1955 Treaty, and the relevant instruments of reference, all point to that line.

81. Since independence, Chad's unwavering view has been that its northern frontier lies along the 1899 line, although it has not always been able to exercise its power or sovereignty in the Aozou strip. From 1968 there has been armed opposition in the Aozou strip, probably indirectly supported by Libya. Since 1973 Libya has been in military occupation of the Aozou strip. As will be shown in later submissions, Chad took the matter to the United Nations and the OAU, at all times insisting that its northern frontier lay on the 1899 line, and protesting at its violation and the occupation of its territory.

Mr. President, I thank the Court very much for its kind attention. The heart of our case is the 1955 Treaty and I ask the President to call Professor Cot to address you on that.

The PRESIDENT: Thank you very much, Professor Higgins. Professor Cot.

M. COT : Monsieur le Président, Messieurs de la Cour.

C'est un honneur et une épreuve que de paraître devant vous pour la première fois en qualité d'avocat et conseil. J'avais eu le plaisir de plaider devant une Chambre de votre Cour, il y a quelques années. Mais la solennité de votre formation plénière, le talent des collègues de l'autre côté de la barre, l'importance de l'enjeu de la présente affaire pour la République du Tchad en intimideraient de plus aguerris que moi.

Monsieur le Président, Messieurs de la Cour.

Allons à l'essentiel. La Partie libyenne a mis beaucoup d'ingéniosité et de talent à compliquer une affaire toute simple. Il existe un traité international, régulièrement conclu entre deux Etats souverains, — la République française et le Royaume-Uni de Libye —, le 10 août 1955. Les droits et obligations stipulés par le traité lient aujourd'hui les Parties à la présente instance devant la Cour; la Libye comme signataire du traité, le Tchad par succession à la France.

Les deux Parties en conviennent. La Jamahiriya arabe libyenne a sans doute évoqué dans ses écrits diverses causes de nullité ou d'inopposabilité du traité du 10 août 1955. Elle a clairement renoncé à s'en prévaloir. Je lis :

> "France's conduct in the 1955 negociations *has not been invoked as a cause of challenge to the 1955 Treaty* insofar as the present case is concerned; *and this remains so...*" (réplique de la Libye, par. 5.02; les italiques sont de nous).

Et l'argumentation orale de nos adversaires le confirme : la Libye entend respecter ses obligations internationales et, singulièrement, celles qui découlent du traité de 1955 (CR 93/15, p. 14).

Nous pouvons donc circonscrire notre désaccord. La Partie tchadienne prétend que le traité de 1955 définit la frontière entre le Tchad et la Libye. Il suffit d'appliquer le traité pour trancher le différend territorial. La Partie libyenne estime que le traité de 1955 n'a pas cet effet et qu'il laisse ouverte la question des frontières entre les deux hautes Parties contractantes.

Notre désaccord porte donc sur l'interprétation du traité du 10 août 1955. Et ceci est du reste excellemment affirmé dans la réplique libyenne :

> "the 1955 Treaty would be expected to be the starting-point for the Court's task, since it either did (Chad's view) or dit not (Libya's view) establish the boundary" (réplique de la Libye, par. 2.01).

Je ne saurai mieux dire.

Permettez-moi, Monsieur le Président, à cet égard, de corriger une impression erronée. Je ne sais pas où nos honorables contradicteurs ont été chercher l'idée que nous accordions aujourd'hui moins d'importance au traité de 1955 que dans nos premières écritures (CR 93/15, p. 11, 12 et 13). Je les rassure toute de suite. D'après la République du Tchad, l'application du traité du 10 août 1955, en toutes ses dispositions, et sans aller au-delà, suffit à établir la ligne frontière et donc à nous adjuger nos conclusions.

En d'autres termes, la République du Tchad considère qu'il convient de suivre l'avis de cette autorité en matière d'interprétation des traités cité par sir Ian Sinclair : «Begin at the beginning, said the King very gravely and go on till you come to the end; then stop.» (Lewis Carroll, *Alice in Wonderland*, chap. XII.) Obéissons donc au roi d'*Alice au pays des Merveilles* et prenons le texte du traité du 10 août 1955.

Que dit le traité ? Pour en interpréter les dispositions, il convient de recourir aux règles d'interprétation dégagées par votre jurisprudence nuancée, et codifiées par la convention de Vienne. Celle-ci nous engage à examiner d'abord, pour reprendre la formule de Paul Reuter : "les éléments qui constituent *par priorité* et *simultanément* la matière première de l'interprétation" (*Introduction au droit des traités*, IHEI, Genève, et PUF, Paris 2e éd., 1985, p. 85).

L'article 31 de la convention de Vienne, sous le titre "La règle générale d'interprétation", range dans cette catégorie :

— les termes du traité;

— le contexte (y compris le préambule et les annexes);

— les accords ultérieurs conclus au sujet de l'interprétation du traité;

— la pratique subséquente des Parties dans la mesure où elle est constitutive d'un tel accord.

Les moyens complémentaires d'interprétation (article 32 : travaux préparatoires, circonstances dans lesquelles le traité a été conclu) n'interviennent qu'en second lieu.

Je suivrai ces recommandations dans ma plaidoirie, en appliquant d'abord la règle générale d'interprétation puis en examinant les moyens complémentaires d'interprétation. Monsieur le

Président, Messieurs de la Cour, vous pardonnerez le caractère un peu scolaire de cette démonstration, mais je n'entends pas me laisser tenter par les chemins de traverse qu'ont multipliés nos contradicteurs.

Le traité du 10 août 1955 apporte à lui seul une réponse non équivoque au différend qui oppose la République du Tchad à la Jamahiriya arabe libyenne.

Monsieur le Président, Messieurs de la Cour, le traité du 10 août 1955 est un texte complexe : l'accord entre les Parties comprend :

— le traité de onze articles;

— quatre conventions qui règlent l'évacuation des troupes françaises du territoire libyen, les relations de bon voisinage, la coopération économique, la coopération culturelle;

— enfin, onze annexes dont l'annexe I qui définit les textes en vigueur dont résulte la frontière entre les deux Parties.

Les conventions et annexes "sont jointes au présent traité et en font partie intégrante" pour reprendre la formule de l'article 9 du traité.

Le préambule du traité en précise l'objet et le but. Vous me permettrez, Monsieur le Président, d'en citer le second paragraphe :

> "Convaincus qu'un traité d'amitié et de bon voisinage, conclu dans un esprit de compréhension réciproque et sur la base d'une égalité, d'une indépendance et d'une liberté complètes, facilitera le règlement de toutes les questions que posent pour les deux pays leur situation géographique et leurs intérêts en Afrique et en Méditerranée."

Le préambule précise bien que les Parties ont entendu régler *toutes* les questions, je dis bien toutes, que posent pour les deux pays leur situation géographique et leurs intérêts en Afrique. Il exprime la volonté de ne pas laisser subsister de contentieux entre les Parties à cet égard. Le corps du traité prévoit au demeurant, et quand il le faut, les procédures adéquates pour lever toute ambiguïté, et par exemple, s'agissant plus précisément des frontières, une procédure d'abornement là où l'un des deux gouvernements l'estimerait nécessaire.

Longuement négocié, le texte du traité du 10 août 1955 se présente comme un accord global et équilibré, chacune des Parties ayant, de toute évidence, accepté certaines concessions,

— sur le principe de l'évacuation totale des troupes françaises du territoire libyen;

— sur le calendrier d'évacuation de ces troupes, le régime transitoire;

— sur la définition des frontières;

— sur le régime de bon voisinage;

— sur la coopération économique et culturelle;

— sur l'aide financière.

Ces obligations constituent un ensemble où chacun y retrouve son compte, chaque Partie ayant plutôt insisté sur telle ou telle clause en cours de négociation comme il est de coutume.

La définition des frontières, Monsieur le Président, est incontestablement un des objets du traité. La préoccupation de doter la Libye de frontières précises et reconnues apparaît dès les travaux des Nations Unies et se trouve formulée dans la résolution 392 (V) que mon collègue, M. Franck, évoquera plus longuement. Cette préoccupation ressort de l'historique de la négociation, comme des débats parlementaires relatifs à l'autorisation de ratification du traité du 10 août 1955. Enfin, la définition de la ligne frontière est l'objet même de l'article 3 du traité et de son annexe I, dispositions dont je vous rappelle les termes :

"Article 3

> Les deux hautes Parties Contractantes reconnaissent que les frontières séparant les territoires de la Tunisie, de l'Algérie, de l'Afrique occidentale française et de l'Afrique équatoriale française d'une part, du territoire de la Libye d'autre part, sont celles qui résultent des actes internationaux en vigueur à la date de la constitution du Royaume Uni de Libye tels qu'ils sont définis dans l'échange de lettres ci-jointes (annexes I)."

Et l'annexe I précise :

"*Annexe I*

Il s'agit des textes suivants :

— la convention franco-britannique du 14 juin 1898;

— la déclaration additionnelle, du 21 mars 1899, à la convention précédente;

— les accords franco-italiens du 1er novembre 1902;

— la convention entre la République française et la Sublime Porte du 12 mai 1910;

— la convention franco-britannique du 8 septembre 1919;

— l'arrangement franco-italien du 12 septembre 1919.»

Le troisième alinéa de l'annexe I précise le tracé de la frontière entre Ghat et Toummo par référence à trois points. Le quatrième alinéa prévoit une procédure d'abornement par commission mixte au cas où l'un des deux gouvernements l'estimerait nécessaire. Le dernier alinéa institue une procédure d'arbitrage en cas de désaccord au cours des opérations d'abornement.

Pour éclairer ces dispositions, il convient de rappeler ici un principe cardinal sous-jacent à tout traité frontière, celui de la stabilité et de la finalité du règlement territorial. La Cour permanente de Justice internationale l'a formulé en ces termes dans l'avis relatif à l'article 2, paragraphe 3, du traité de Lausanne :

> "il résulte ... de la nature même d'une frontière et de toute convention destinée à établir les frontières entre deux pays, qu'une frontière doit être une délimitation précise dans toute son étendue" (*Interprétation de l'article 3, paragraphe 2, du traité de Lausanne, avis consultatif, 1925, C.P.J.I. série B n° 12*, p. 20).

Et votre Cour a repris cette considération et en a élargi la portée dans l'affaire du *Temple de Préah Vihéar* : "D'une manière générale, lorsque deux pays définissent entre eux une frontière, un de leurs principaux objectifs est d'arrêter une solution stable et définitive." (*C.I.J. Recueil 1962*, p. 34.)

Certes, la volonté de parvenir à un règlement territorial définitif constitue une présomption qui pèse lourd dans la présente affaire. Et pour y faire échec, pour établir que les Parties ont eu une autre volonté que celle-là, il ne suffit pas, Monsieur le Président, Messieurs de la Cour, d'avancer des allégations ou des hypothèses : il faut encore apporter des éléments de preuve d'une intention commune qui soit différente.

Jusqu'à preuve contraire, me semble-t-il, il faut présumer que les parties au traité du 10 août 1955 ont eu l'intention de définir leur frontière commune d'une manière définitive et sur toute sa longueur. Pour mettre en oeuvre ce principe de la stabilité et de la sécurité des frontières, les hautes parties contractantes ont pris comme référence les accords internationaux qu'ils considéraient comme en vigueur à la date de la constitution du Royaume Uni de Libye.

Ce faisant, ils ont appliqué

> "l'obligation de respecter les frontières internationales préexistantes en cas de succession d'Etats [qui] découle sans aucun doute d'une règle générale de droit international, qu'elle trouve ou non son expression dans la formule *uti possidetis*" (*C.I.J. Recueil 1986*, p/ 566, par. 24).

Vous avez reconnu ici l'expression utilisée par la Chambre constituée par votre Cour dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*. Mais n'oublions pas que nous sommes ici en présence de deux Etats souverains qui, par un traité librement conclu, règlent comme ils l'entendent les questions pendantes entre eux — et appliquent comme ils l'entendent la règle générale de droit international public — sous réserve sans doute du *jus cogens*, qui n'est pas en cause ici.

La Chambre constituée par votre Cour dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* a eu l'occasion de souligner récemment la portée relative du principe de l'*uti possidetis*, à propos de la notion de date critique en ces termes :

> "Le principe de l'*uti possidetis juris* est quelquefois affirmé en termes presque absolus, comme si la situation à la date de l'indépendance était toujours déterminante; comme si, en bref, il ne pouvait y avoir d'autre date critique. Or, comme il ressort de l'analyse ci-dessus, il ne saurait en être ainsi. Manifestement, une date critique ultérieure peut apparaître, par exemple par suite d'une décision d'un juge ou d'un traité frontalier."

Eh bien, de même que les parties peuvent par voie de convention déplacer le curseur de la date critique, voire en admettre plusieurs, de même il leur appartient le cas échéant d'interpréter ou de préciser la ligne frontière découlant du principe de l'*uti possidetis*.

En d'autres termes, l'intention des Parties doit sans doute être éclairée par le principe général de droit international, l'*uti possidetis*. Elle ne saurait se réduire à une application mécanique de ce principe. L'autonomie de la volonté des parties prime dans la rédaction du traité et dans son interprétation.

Pour définir avec précision la frontière, les Parties ont recours à une technique éprouvée du droit de la pratique internationale, qui est le renvoi à des accords antérieurs qui ont délimité la frontière ou des portions de cette frontière. Nous avons cité un certain nombre d'exemples dans notre contre-mémoire, et notamment :

— le traité de bon voisinage signé par l'Irak et la Turquie en 1946,

— le protocole de Gao signé par le Mali et le Niger en 1962,

— enfin le traité du 23 juin 1960, conclu entre l'Union soviétique et la Finlande, qui présente l'intérêt d'utiliser le même verbe «résulter» que notre traité. J'en cite un extrait :

> "La frontière d'Etat entre la République de Finlande et l'Union des Républiques socialistes soviétiques, *telle qu'elle résulte* du traité de paix entre la République de

Finlande et la République socialiste fédérative de Russie, en date du 14 octobre 1920, du traité de paix..." (Suit une série d'autres accords internationaux de référence.) (*CMT*, p. 491-492, par. 1139.)

Or, dans notre affaire et s'agissant du traité de 1955, si l'on met "bout à bout" — la Cour me permettra cette expression — les textes cités par l'annexe I, on obtient une ligne frontière précise sur l'ensemble de la longueur séparant les territoires respectifs des deux hautes parties contractantes. Ceci permet d'atteindre le résultat recherché et annoncé par le préambule du traité et par le texte même de l'article 3, à la satisfaction des deux Parties; M. Pellet y reviendra. Il n'y a qu'un segment de frontière où les Parties considèrent que le résultat n'est pas satisfaisant. C'est celui qui va de Ghat à Toummo. L'annexe I précise donc les trois points par lesquels la frontière doit passer sur ce segment.

Le traité complète ces dispositions par une procédure d'abornement "au cas où l'un des deux gouvernements l'estimerait nécessaire" et prévoit l'institution d'un arbitrage "en cas de désaccord au cours des opérations d'abornement". Or, nous le savons, l'abornement, opération matérielle, suppose que la délimitation ait été effectuée auparavant.

Voilà un ensemble de dispositions qui paraissent tomber sous le sens et qui n'ont certainement rien d'insolite ou d'extravagant.

Mais tout est trop simple, d'après la partie libyenne. Reprenons donc le texte de l'article 3 et de l'annexe I pour les soumettre à une analyse plus serrée. J'observe du reste que la Partie libyenne rechigne quelque peu à une analyse grammaticale rigoureuse du texte inséré dans son contexte. Elle préfère butiner de-ci, de-là, faire son miel là où ele le peut, faire son miel là où elle le veut. Pour ma part je vous convie à un exercice de mot à mot en vous priant, Monsieur le Président, Messieurs de la Cour, d'excuser l'aridité de ces développements nécessaires.

Et je vous propose donc maintenant de prendre le texte même du traité pour cet exercice. Je prends l'article 3 :

"Les deux Hautes Parties contractantes *reconnaissent* que les frontières...» Le premier verbe pose déjà à nos contradicteurs un problème — que je crois être un faux problème. Ils annoncent que cette reconnaissance ne saurait être que déclaratoire, descriptive de la situation juridique à la date de

l'indépendance de la Libye. L'affirmation me paraît hâtive et en contradiction avec l'autonomie de la volonté des Parties. Pour le moins, elle sollicite le texte.

Lorsque deux Etats souverains reconnaissent par traité une situation de fait ou de droit, la reconnaissance est à la fois déclaratoire et constitutive. Il s'agit, nous le savons, d'une qualification ou d'une interprétation commune, authentique et souveraine par les parties d'une situation.

Au demeurant, votre jurisprudence, dans sa sagesse, estime inutile de se prononcer sur le caractère déclaratif ou constitutif d'un tel acte de reconnaissance d'une situation territoriale. Vous l'avez encore rappelé récemment dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* (arrêt du 11 septembre 1992, *C.I.J. Recueil 1992*, p. 401 et 485-486, par. 67 et 206).

De même, dans notre instance, il n'est pas davantage nécessaire de décider si la reconnaissance à laquelle fait allusion l'article 3 du traité, a un effet déclaratif ou constitutif, dès lors que les parties considèrent souverainement que leur frontière est bien délimitée par les textes cités.

Enfin, et sur ce premier verbe, je trouve dans la même annexe I une autre utilisation du verbe "reconnaître", dans une acceptation, elle, nettement constitutive, de l'aveu même de nos honorables contradicteurs. Après avoir défini les actes internationaux de référence, les deux Parties ajoutent :

> "En ce qui concerne ce dernier arrangement (celui du 12 septembre 1919) et conformément aux principes qui y sont énoncés, il *a été reconnu* par les deux délégations qu'entre Ghât et Toummo, la frontière passe par les trois points suivants..."

Il faudrait que nos contradicteurs de la Partie libyenne expliquent pourquoi, dans la même annexe I, les mots "reconnaissent que" ont une signification rigoureusement déclarative, alors que les mots "il a été reconnu" valent rectification de l'accord visé, et ont donc une signification constitutive.

Je continue la lecture de l'article 3 : "Ces frontières ... *sont celles qui résultent* des actes internationaux en vigueur.» La Partie libyenne observe que le texte arabe répète le terme de frontière et se lit : "Les frontières ... *sont les frontières* qui résultent."

Tant mieux ! Plus on souligne qu'il s'agit bien de frontières, c'est-à-dire de lignes séparant les territoires des deux parties et non pas d'une zone indéterminée, plus le texte gagne en précision!

Je n'insiste pas sur le curieux procès fait dans les écritures libyennes sur le verbe "résulter" (réplique de la Libye, par. 5.39 et 5.79) — procès qui n'a d'ailleurs pas été repris par sir Ian dans sa

plaidoirie orale. Je renvoie sur ce point nos contradicteurs aux bons dictionnaires français, unanimes pour considérer que "résulter" veut dire "être produit par une cause", synonyme de "découler", de "s'ensuivre", d'"être issu".

La frontière entre le Tchad et la Libye

— "résulte bien",

— "découle" ou

— "s'ensuit"

des traités signés dans l'annexe I.

Et j'en viens à la notion d'"actes internationaux en vigueur". Je l'ai déjà dit, la référence à des accords internationaux préalables, c'est-à-dire à des "actes internationaux en vigueur" pour définir avec précision une ligne frontière est de pratique internationale ordinaire. Or, la Partie libyenne monte cette expression banale en épingle et y voit curieusement une volonté farouche de la France, des négociateurs français, d'exclure la prise en considération des effectivités pour la détermination de la frontière, et ceci à quelque titre que ce soit. Nos contradicteurs l'ont rappelé longuement au cours de leurs plaidoiries orales en observant en particulier que cette formulation de l'article 3 disqualifierait la troisième thèse tchadienne (CR 93/15, p. 71, 76 et 77; CR 93/20, p. 30) mais aussi la seconde et porterait un coup sévère à la première. Or, ici encore, je trouve que nos honorables contradicteurs sollicitent très abusivement le texte du traité, ainsi que le passage de nos écritures où nous constatons que l'article 3 se réfère aux actes internationaux (réplique de la Libye, par. 4.07).

Le traité ne fait pas référence aux effectivités pour tracer la frontière. La belle affaire que voilà! C'est le contraire qui eût été étonnant. Je n'ai pas la longue expérience de sir Ian en matière de négociations des traités, mais, Monsieur le Président, je n'ai jamais vu un traité frontière définir une ligne frontière par référence à des effectivités et dire par exemple : «Dans le massif du Tibesti, la frontière suivra la ligne de partage entre les effectivités tchadiennes et libyennes.»

Ce serait pour le coup instaurer l'arbitraire et l'aléatoire là où l'on cherche la précision et la sécurité. Il me semble que la thèse libyenne, voyant dans le libellé de l'article 3 une volonté précise d'écarter toute prise en considération des effectivités à l'occasion de la délimitation de la ligne

frontière, repose sur une grave confusion intellectuelle.

Nous prétendons que les choses sont plus simples que nos contradicteurs ne le disent. L'article 3 renvoie à des articles antérieurs par souci de délimiter avec précision la ligne frontière, mais ces dispositions doivent être interprétées par application des règles générales du droit international public. Or, lesdites règles prennent en considération, le cas échéant, les effectivités pour confirmer le titre conventionnel ou l'interpréter dans la pratique, et ceci dans les conditions qu'a précisées la Chambre dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali), C.I.J. Recueil 1986*, par. 63).

J'en viens maintenant à la notion d'"actes internationaux *en vigueur* à la date de la constitution du Royaume Uni de Libye". Les hautes parties contractantes ont évidemment considéré que les textes énumérés étaient en vigueur à cette date, sinon, ils ne les auraient pas cités, c'est l'évidence. Au demeurant, pour l'un de ces textes — l'arrangement franco-italien du 12 septembre 1919 — ils ont même précisé la frontière "conformément aux principes qui y sont énoncés" — c'est le libellé utilisé dans l'annexe I — et par référence à trois points géographiques. Les hautes parties contractantes, Messieurs de la Cour, n'auraient évidemment pas fait allusion aux "principes qui y sont énoncés" s'ils avaient nourri le moindre doute sur l'applicabilité de l'arrangement qui était bien en vigueur à leurs yeux.

Voilà qui suffit à régler le problème si l'on s'en tient à l'autonomie de la volonté des parties. Mais nos contradicteurs, campant sur la nature déclaratoire de l'article 3 et de l'annexe I, considèrent que cela ne suffit pas et que les textes cités — ou du moins certains d'entre eux — ne valent rien puisqu'ils n'ont pas été notifiés par la France à l'Italie en application de l'article 44 du traité de paix de 1947. Le professeur Condorelli nous a expliqué le sens de cette disposition et notamment de son alinéa 3 qui précise : "tous les traités de cette nature [c'est-à-dire les traités bilatéraux] qui n'auront pas fait l'objet d'une telle notification seront tenus pour abrogés".

Et notre contradicteur de conclure triomphalement son syllogisme : puisque les traités de 1902 et de 1919 n'ont pas été portés sur la liste notifiée par la France, ils ne sont pas en vigueur à la date critique (CR 93/17, p. 78) ! Je ne crois pas trahir sa démonstration.

Mais pourquoi la France et la Libye n'ont-elles pas anticipé en 1955 sur le raisonnement de M. Condorelli ? C'est parce que, du moins elles l'estimaient, l'article 44 ne s'appliquait pas à cette catégorie de traités. Je vous le rappelle, par l'article 23 du traité de paix, l'Italie avait renoncé "à tous droits et titres" sur ses anciennes colonies — formule que la commission mixte franco-italienne a considéré dans sa décision du 9 juillet 1962 comportant "cession de territoire" (décision n° 284).

Nous sommes peut-être en désaccord sur l'analyse juridique du statut des anciennes colonies italiennes après la signature du traité de paix puisque M. Condorelli y voit une suspension de souveraineté (CR 93/17, p. 77-78), alors que nous-mêmes avons considéré dans nos écritures, avec la majorité de la doctrine italienne, qu'il y avait transfert de souveraineté aux quatre puissances (réplique du Tchad, par. 3.57).

Mais ce désaccord n'a aucune conséquence sur la question en discussion, puisque nous convenons au moins d'une chose : c'est que les conventions relatives aux anciennes colonies italiennes ne concernent plus l'Italie à partir de l'entrée en vigueur du traité de paix. Ces conventions n'entrent donc pas dans le champ d'application de l'article 44 du traité de paix. Au demeurant, la pratique internationale apporte une réponse claire et qui ne souffre pas discussion. Aucun traité de paix, je dis bien *aucun* traité concernant les anciennes colonies italiennes n'a fait l'objet d'une notification au titre de l'article 44, ni par la France, ni par la Grande-Bretagne, ni par les autres parties au traité de paix.

Et ce n'est pas faute de texte entrant dans cette catégorie. Si j'en crois l'énumération donnée par M. Brownlie dans son ouvrage de référence *The African Boundaries*, outre les traités franco-italiens, dont je parlais, il existait deux autres traités concernant la Libye, quatorze pour l'Erythrée, trois pour la Somalie, dont vous trouverez la liste dans le petit dossier d'audience.

Au demeurant, on ne voit pas comment les quatre puissances auxquelles le traité de paix confie (article 23 et annexe XI) le soin de procéder le cas échéant à des ajustements de frontière, auraient pu oeuvrer si lesdits traités avaient été abrogés.

Et on ne voit pas davantage comment la commission intérimaire de l'Assemblée générale aurait pu examiner la question de la procédure à adopter pour délimiter les frontières des anciennes

colonies italiennes "pour autant qu'elles ne se trouvent pas déjà fixées par des arrangements internationaux" (résolution 289 IV), si lesdits arrangements internationaux n'étaient plus considérés comme étant en vigueur. Et le mémorandum du Secrétariat général de l'Organisation des Nations Unies préparé pour la commission intérimaire et en date du 27 janvier 1950 cite "les arrangements internationaux *existants*, en ce qui concerne les frontières des anciennes colonies italiennes", soit quatorze accords conclus par l'Italie, dont la convention franco-italienne de 1919. Vous trouverez la liste de ces conventions dans votre dossier d'audience.

L'Italie a confirmé cette interprétation dans les rapports qu'elle a transmis à l'Assemblée générale au titre de la tutelle sur la Somalie, rapports où elle vise les accords du 5 mai 1894 pour la frontière avec le Somaliland, et du 15 juillet 1924 pour la frontière avec le Kenya (*rapport 1958*, Rome, ministère des affaires étrangères, 1959, p. 3).

Enfin, votre propre Cour, je le rappelle, a consacré dans l'affaire du *Plateau continental Tunisie/Libye* la "règle de continuité *ipso jure* des traités de frontière et des traités territoriaux" (*C.I.J. Recueil 1982*, p. 66, par. 84).

Il faudrait que M. Condorelli prouve la volonté des parties au traité de 1955 de partager son analyse pour le moins et, ce faisant, d'écarter une pratique internationale unanime quant au sens et à la portée de l'article 44 du traité de paix. Or, vous ne trouverez pas cette preuve dans le dossier de la Partie libyenne.

Nous pouvons donc considérer, je vous le suggère, Monsieur le Président, Messieurs de la Cour, avec les hautes parties contractantes que les traités définis par l'annexe I étaient bien en vigueur à la date critique.

Monsieur le Président, s'il plaît à la Cour je pourrais interrompre ici ma plaidoirie et la reprendre lundi matin.

The PRESIDENT: Do you wish to cease here, Professor Cot? If you had say five or ten minutes more perhaps we could go on if you would prefer to do that.

M. COT : Je suis à la disposition de la Cour et je puis donc terminer le texte de l'article 3 si

cela peut convenir pour la compréhension d'ensemble de ma démonstration, ce qui fait que je passerai ensuite au contexte lundi matin.

J'en arrive donc si vous le souhaitez, Monsieur le Président, Messieurs de la Cour, au bout du texte de l'article 3, en vous priant de nouveau d'excuser le caractère un peu scolaire de cette démonstration et je lis "les actes internationaux ... *tels qu'ils sont définis* dans l'échange de lettres ci-jointes".

Le verbe "définir", Monsieur le Président, est un verbe précis et vigoureux dans la langue française. Il comprend la notion de détermination et s'oppose à l'idée d'indétermination. L'antonyme de "défini" c'est "indéfini". Face à une expression d'une telle détermination, d'une telle volonté de précision, la Partie libyenne voudrait interpréter les textes de l'annexe I comme une simple illustration, sans valeur contraignante, des traités qui pourraient s'appliquer en matière frontalière.

Dans sa plaidoirie orale, sir Ian Sinclair a d'ailleurs traduit l'expression française "tels qu'ils sont définis" par "as listed in annex I" (CR 93/15, p. 27, 31 et 49). Or, je ne trouve pas cette traduction dans les bons lexiques et me permets de suggérer plutôt à sir Ian "as defined" ou "as determined". Cette affaire sémantique, Monsieur le président, Messieurs, est importante, car nous touchons ici au coeur même de la technique de délimitation des frontières mise en oeuvre par les Hautes Parties contractantes.

Nos contradicteurs libyens partent d'un constat exact : l'annexe I ne cite pas tous les traités relatifs à la frontière entre la Libye et les possessions françaises d'Afrique. Mais la Partie libyenne en tire la conclusion hâtive qu'il s'agit d'une simple illustration, d'une énumération sans valeur contraignante à laquelle se seraient livrées les parties contractantes. Ce faisant, elle vide l'annexe I et donc l'article 3 de toute portée juridique, de tout effet utile.

Monsieur le Président, Messieurs de la Cour, l'annexe I n'est pas un répertoire analytique des traités frontaliers, c'est une disposition normative. Cette annexe définit un ensemble de textes qui décrit de manière complète et précise la frontière entre les deux Parties. Cette annexe omet délibérément tout texte qui, tel le traité de Rome de 1935, serait en contradiction avec la ligne ainsi définie. Elle met donc en oeuvre une technique juridique cohérente, une liste de traités de référence.

pour assurer un résultat précis : une frontière incontestable.

Les actes internationaux, tels qu'ils sont définis dans l'échange de lettres que constitue l'annexe I,

— ce ne sont pas *tous* les actes internationaux en vigueur,

— ce ne sont pas davantage *n'importe* quels actes internationaux en vigueur.

La définition d'une pareille liste, c'est le choix, la sélection de certains instruments juridiques, afin de donner effet utile à une intention : celle de délimiter la frontière entre le Royaume Uni de Libye et les territoires de la Tunisie, de l'Algérie, de l'AOF et de l'AEF. Si les parties au traité du 10 août 1955 en avaient convenu autrement, si elles avaient simplement voulu illustrer un propos général, elles auraient utilisé un autre langage. Elles auraient inséré une expression comme "par exemple" ou "à titre d'illustration". Or je ne trouve rien de tel, ni dans le traité, ni dans l'annexe I. J'en conclus que les parties avaient bien l'intention, en citant ces textes précis, de délimiter la ligne frontière.

Pour faire échec à cette conclusion, pour réduire à néant l'effet juridique de l'annexe I la Partie libyenne doit apporter des éléments de preuve de l'intention commune des Parties que vous ne trouverez pas dans le dossier.

Monsieur le Président, si vous le permettez, j'arrêterai là la démonstration, parce que ensuite je dois passer à un autre volet. Je vous remercie pour votre patience, je remercie Messieurs les juges. Bon week-end.

The PRESIDENT: Thank you, Professor Cot. Till Monday morning at 10 o'clock.

L'audience est levée à 13 h 05.

CR 93/22

International Court of Justice
THE HAGUE

Cour internationale de Justice
La HAYE

YEAR 1993

Public sitting

held on Monday 28 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le lundi 28 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X - Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center for International Studies, New York University, School of Law,

Mr. Olivier Corten, Assistant at the Faculty of Law of the Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X - Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X - Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fanchel,
Mrs. Susan Hunt,
Miss Florence Jovis,
Mrs. Mireille Jung,
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. I give the floor to Mr. Cot.

M. COT : Monsieur le Président, Messieurs de la Cour,

Nous avons abordé vendredi dernier, il vous en souvient, l'examen du texte du traité du 10 août 1955.

Les deux Parties considèrent ce traité comme applicable dans leurs relations. Le Tchad prétend qu'il règle leur différend frontalier; la Libye le conteste. Notre désaccord porte donc sur l'interprétation du traité de 1955 et singulièrement sur l'interprétation de l'article 3 du traité et de son annexe I.

J'avais rappelé ce principe cardinal des relations internationales à ce propos qu'un traité frontière doit être présumé délimiter la ligne frontière. Et j'avais souligné aussi bien l'importance de la règle *uti possidetis*, dont s'inspire le traité que sa nécessaire combinaison avec l'autonomie de la volonté des Hautes Parties contractantes souveraines.

J'avais ensuite abordé le texte de l'article 3 du traité, vous conviant à un examen mot à mot un peu scolaire, et nous avions constaté alors que les Hautes Parties contractantes avaient mis en oeuvre une technique somme toute banale du droit des gens : le renvoi à des actes internationaux antérieurs, bien définis, pour le tracé de la ligne frontière.

Au cours de cette analyse littérale du texte de l'article 3, nous avions écarté certaines objections libyennes touchant notamment la reconnaissance internationale, la notion d'acte en vigueur et le rôle des effectivités.

Il résultait, me semble-t-il, de cette analyse textuelle que, sauf preuve contraire, l'article 3 du traité avait bien pour objet et pour effet de délimiter la frontière entre les deux Parties à la présente instance.

Monsieur le Président, Messieurs de la Cour,

Avant de passer à l'examen du contexte de l'article 3, il me reste à évoquer en quelques mots deux arguments de la Partie libyenne.

Nos contradicteurs se sentent en effet pris dans l'étau logique de l'article 3. Ils sentent cet étau se resserrer autour d'eux. Ils cherchent, on les comprend, une échappatoire. Ils échafaudent, pour ce faire, deux hypothèses bien fragiles dont je ne vois nulle part le fondement.

1. L'hypothèse d'un mandat implicite de négociation qui serait formulé par le traité de 1955;

2. l'hypothèse des deux segments de frontière, auxquels les Hautes Parties contractantes auraient réservé un sort différend.

Je commence par l'hypothèse du mandat implicite de négociation qui permettrait, d'après nos adversaires, d'expliquer la présence insolite de l'annexe I qui sans cela n'a pas de sens dans leur logique; puisque les textes énumérés ne délimitent pas la frontière pour eux, et qu'il faut bien que ces textes servent à quelque chose, nos contradicteurs libyens estiment que ces textes constitueraient la base d'une sorte de mandat implicite, d'invitation à négocier en quelque sorte par la suite.

Je lis dans la réplique libyenne :

> "States may choose to refer to other treaties in order definitively to settle a boundary; or they may make such a reference, as here to provide and agreed basis for a possible settlement" (Réplique de la Libye, p. 52, note 11).

Je comprends que cette hypothèse arrange les affaires de nos honorables contradicteurs. Malheureusement pour eux, elle ne repose sur aucun fondement. Au contraire, nous l'avons vu, en prévoyant explicitement une procédure d'abornement, l'annexe I suppose que le problème de délimitation a déjà été réglé dans le corps du traité.

Si les Parties contractantes avaient entendu confier un mandat ultérieur de négociation sur la délimitation, elles l'auraient indiqué en toutes lettres. Au minimum, elles auraient utilisé une formule du type de celle que l'on relève dans le traité de Lausanne du 24 juillet 1923.

> "De la mer Méditerranée à la frontière de Perse, la frontière de la Turquie est fixée comme suit : (...)
>
> 2. Avec l'Irak :
>
> La frontière entre la Turquie et l'Irak *sera déterminée* à l'*amiable* entre la Turquie et la Grande-Bretagne dans un délai de neuf mois."

Car, ne l'oublions jamais, l'objet de l'article 3 du traité du 10 août 1955 est bien de délimiter la frontière. Or, votre Cour l'a rappelé dans l'affaire des parcelles frontalières :

> "Toute interprétation qui serait tenir la convention de délimitation comme laissant en suspens et abandonnant à une appréciation ultérieure du *statu quo* la détermination de l'appartenance à l'un ou l'autre Etat des parcelles litigieuses, serait incompatible avec cette intention commune." (*Souveraineté sur certaines parcelles frontalières, C.I.J. Recueil 1955*, p. 221-222.)

La Partie libyenne cherche à expliquer que l'intention des Parties n'était pas identique sur ce point, d'après elle la France cherchant à délimiter la frontière commune, alors que ce n'était pas l'intention des négociateurs libyens. Nous y reviendrons à propos des moyens complémentaires d'interprétation. Il nous suffit de noter à ce stade avec votre Chambre constituée dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* :

> "dans l'interprétation d'un texte de ce genre, il faut considérer l'intention commune telle qu'exprimée dans les termes du compromis" (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)*, *C.I.J. Recueil 1992*, par. 376).

Or, Monsieur le Président, Messieurs de la Cour, l'intention commune qui ressort du texte de l'article 3 et de l'annexe I, c'est bien d'arrêter la ligne frontière entre les deux Hautes Parties contractantes. Au demeurant, je note que la Partie libyenne elle-même ne

peut pas développer complètement l'argument du mandat implicite de négociation. Elle est obligée d'admettre que la frontière a été délimitée jusqu'à Toummo et parle à ce propos d'un règlement partial, "partial settlement", de la frontière jusqu'à Toummo.

L'hypothèse des deux segments de frontière est donc nécessaire dans sa démonstration et vient s'ajouter à l'hypothèse du mandat implicite de négociation. Elle ne repose sur rien.

L'article 3 et l'annexe I visent une frontière unique, ils énumèrent les textes pertinents sans faire de *distinguo*. Je rapelle ici l'avis de la Cour permanente dans l'affaire du l'*Interprétation de l'article 3, paragraphe 2, du traité de Lausanne* :

> "il est naturel que tout article destiné à fixer une frontière soit, si possible, interprété de telle sorte que, par son application intégrale, une frontière précise, complète et définitive soit obtenue" (*C.P.J.I. série B n° 12*, p. 20).

Or, cette interprétation est possible. C'est celle que propose la République du Tchad. Et elle a pour effet de fixer une frontière précise, complète et définitive. L'hypothèse contraire, pour être prise en considération, doit être clairement formulée par les Parties. Comme vous l'avez fait observer, Monsieur le Président, dans votre récent arrêt, du 14 juin 1993 dans l'affaire de la *Délimitation maritime dans la région située entre le Groenland et Jan Mayen* :

> "Si l'intention avait été autre, l'article 2 en l'espèce, aurait été rédigé de manière à préciser qu'il ne concerne qu'une partie de l'ensemble de la ligne de délimitation envisagée..." (*C.I.J. Recueil 1993*, par. 26.)

J'espère ainsi avoir fait justice des hypothèses hasardeuses avancées par la Partie libyenne pour vider le texte de l'article 3 et de l'annexe I de tout contenu, pour priver ces dispositions de tout effet utile.

Ces hypothèses contreviennent de manière patente à l'objet et au but du traité du 10 août 1955 pris dans son ensemble. Elles stérilisent les clauses visant à régler le contentieux entre les parties et à établir une frontière définitive. De telles hypothèses devraient prendre appui sur un ensemble de preuves solides et concordantes. Vous n'en trouverez pas, dans les pièces ou les propos des Parties à la présente instance.

Monsieur le Président, Messieurs de la Cour,

J'en viens maintenant au contexte, et à la pratique subséquente des Parties.

Le contexte se compose :

- du préambule,
- des autres articles du traité,
- des annexes,
- des conventions particulières.

Tous ces éléments indiquent à notre avis la conviction des Parties au traité que la ligne frontière est bien définie par l'article 3 de l'annexe I. Je n'ai trouvé aucune disposition qui va en sens contraire et qui puisse alimenter les hypothèses libyennes.

L'article 5 du traité, relatif aux mesures à prendre pour la défense des territoires en question, désigne le territoire libyen en ces termes : "en ce qui concerne la Libye, il s'agit du territoire libyen, tel qu'il est défini à l'article 3 du traité" et non pas "tel qu'il sera défini à la suite de négociations prévues", comme le souhaiteraient nos contradicteurs !

Avec tout le respect que je dois à sir Ian, je ne vois pas là une "extravagant assertion" (CR 93/15, p. 51). Cette formule un peu vive a sans doute dépassé sa pensée.

L'article 4 est tout aussi explicite. Il précise que les Hautes Parties contractances prendront toutes les mesures nécessaires au maintien de la sécurité et de la paix "dans les régions avoisinant les frontières définies à l'article précédent".

Je note que ce sont bien les frontières qui sont ainsi définies à l'article 3 et pas seulement les textes de référence. Cet article 4 ne vise en aucune manière une zone frontalière imprécise des "confins", des "borderlands". Il vise les régions avoisinant les frontières définies, et non pas les frontières à définir.

Il faut peut-être rappeler ici à nos contradicteurs que la frontière est définie comme :

> "la ligne formée par une succession de points extrêmes du domaine de validité spatiale des normes de l'ordre juridique de l'Etat"

pour reprendre l'expression utilisée par le tribunal arbitral dans l'affaire *Guinée-Bissau/Sénégal*, ce qui est incompatible avec la notion de "borderland" qu'affectionne tant la Partie libyenne. Monsieur le Président, Messieurs de la Cour, il faudrait à tout le moins prouver que l'intention commune des Parties, en utilisant le terme de "frontière", était de ne pas l'employer dans l'acception juridique ordinaire, ce qui ne ressort à aucun endroit du dossier soumis à la Cour.

La *convention de bon voisinage* ensuite précise les droits et obligations que chaque Partie appliquera "de part et d'autre de la frontière", formule très explicite que l'on trouve en ces articles 3, 10 et 15, la frontière étant définie dans la *convention de bon voisinage* par référence à l'article 3 du traité.

L'article 13 de cette *convention de bon voisinage* prévoit que "les nomades titulaires d'une carte de circulation pour le trafic caravanier pourront *traverser librement la frontière*", encore faut-il qu'il y en ait une.

L'article 21, Monsieur le Président, prévoit la réunion des commissions d'arbitrage alternativement en zone frontalière française ou tunisienne et en zone frontalière libyenne. Il y a donc bien là deux zones frontalières distinctes de part et d'autre de la ligne frontière et non pas une zone frontalière commune, un "borderland" indéfini.

Les articles 9, 10 et 11 citent l'Algérie, l'AOF, l'AEF d'une part, les régions libyennes d'autre part. Et ajoutent sont considérées comme territoire français les régions "du Tibesti, du Borkou et de l'Ennedi".

Sont en revanche considérées comme territoire libyen "les régions de Koufra" et "de Mourzouk". Cette répartition explicite est incompatible bien évidemment avec les conclusions de la Partie libyenne.

La convention particulière, toujours annexée au traité, qui règle certaines facilités consenties aux troupes françaises pendant la période transitoire, présuppose elle aussi une ligne frontière. En particulier l'article 4 de la convention particulière est relatif aux itinéraires et l'article 3 sur la durée de passage en territoire libyen.

L'article 2 de l'annexe 3 de la convention particulière nous intéresse plus particulièrement, plus spécialement. Cet article déclare :

> "La piste n° 5 est l'itinéraire qui, venant de Ramada en Tunisie, passe par ... (un certain nombre de points en territoire libyen) ... et pénètre en territoire du Tchad dans la région de Muri Idie."

Vous voyez sur la carte la piste n° 5 et la région de Muri Idie que je vais essayer de vous indiquer.

D'après la convention particulière, la région de Muri Idie se trouve en territoire tchadien. Or cette région, vous le voyez, est bien située sur le tracé de la piste n° 5, et elle se trouve dans le secteur nord-ouest de la bande d'Aouzou, nettement au nord de la ligne du traité de Rome de 1935.

Dans l'esprit des Hautes Parties contractantes, au traité du 10 août 1955, j'en conclus que la bande d'Aouzou se trouve donc bien en territoire tchadien. La Partie libyenne est évidemment embarrassée par l'argument. On la comprend. Elle prétend qu'il peut y avoir confusion avec le col de Muri Idie, que je vais maintenant vous indiquer, qui est situé très au nord de la ligne frontière, à une centaine de kilomètres, en plein territoire libyen.

Il ne peut donc y avoir confusion. La France et le Tchad n'ayant pour leur part jamais revendiqué de territoire ou de *borderland* au nord du tropique du Cancer. J'observe d'ailleurs que l'existence d'appellations identiques à quelques dizaines ou quelques centaines de kilomètres n'a rien d'étonnant, surtout en pays de montagne, et vous ne m'empêcherez pas de prendre le plaisir de vous projeter une petite carte de la région dont je suis originaire, la Savoie, où vous verrez, par exemple, ici deux cols de la Madeleine, qui se trouvent à une centaine de kilomètres l'un de l'autre par la route, à une cinquantaine de kilomètres à vol d'oiseau.

Si un texte disait qu'un itinéraire venant de la Maurienne pénétrait dans l'arrondissement de Tarentaise par le col de la Madeleine, un enfant n'aurait pas plus de difficulté à identifier le bon col de la Madeleine que dans le cas présent, la région de Muri Idie. Compte tenu du contexte, il ne saurait donc en l'espèce y avoir de confusion sur la région de Muri Idie.

Alors, pour se tirer de ce mauvais pas, nos contradicteurs sont obligés d'inventer une "zone de défense" dont la France aurait la responsabilité et dont les limites ne coïncideraient pas avec les frontières internationales de l'Afrique équatoriale française et de l'Afrique occidentale française. Pour ce faire, ils prennent appui sur

le libellé de l'article 1er de la convention de bon voisinage, annexée au traité, qui évoque :

> "Les frontières ... séparant le Royaume-Uni de Libye des territoires dont la France assume la défense, tels que définis à l'article 5 dudit traité."

Mais, Monsieur le Président, Messieurs de la Cour, l'article 5 du traité du 10 août 1955 renvoie lui-même à l'article 3 du traité et donc à l'annexe I. Dispositions qui, nous l'avons vu, définissent les frontières internationales sans les qualifier de civiles ou de militaires. Et puis surtout, cette hypothèse d'une zone de défense empiétant sur le territoire libyen et confiée à la France contredit un des buts principaux du traité du 10 août 1955 - certainement le but principal aux yeux des négociateurs libyens - l'évacuation totale du territoire libyen de toute présence militaire française.

Le traité du 10 août 1955 est d'abord un traité d'évacuation : c'est le premier ministre libyen de l'époque, M. Ben Halim, qui l'affirme avec force et je dirais presque "à la cantonnade". Le texte du traité fixe un calendrier précis d'évacuation totale, un statut temporaire des troupes françaises pendant la durée de l'évacuation, une réglementation minutieuse de l'utilisation éventuelle des facilités militaires en territoire libyen.

Et nos contradicteurs voudraient faire croire que ce même traité entérinerait implicitement l'existence d'une "zone de défense" française s'étendant à des territoires sous souveraineté libyenne ! Invraisemblable ! Surprenant à tout le moins ! Comme pour l'hypothèse des deux segments de frontières, Messieurs, il faudrait ici produire au moins un commencement de preuve. Or, même dans les minutes libyennes relatives aux ultimes négociations du 19 juillet au 10 août 1955, on ne trouve pas l'ombre d'une suggestion de ce type. Là encore, rien dans le dossier, Messieurs les juges !

Monsieur le Président, Messieurs de la Cour, j'en arrive maintenant à la pratique ultérieurement suivie par les Parties. La convention de Vienne, conformément à votre jurisprudence, tient compte de cette pratique dès lors qu'elle établirait l'accord des parties sur l'interprétation du traité. C'est à ce titre que je l'examinerai. Mes collègues pourront en tirer, dans la suite des plaidoiries, d'autres enseignements.

Les parties ont conclu deux accords ultérieurs qui concernent directement l'interprétation et l'application de notre traité, ceci en 1956 et en 1966. L'accord du 26 décembre 1956 précise la délimitation opérée par le traité de 1955 dans la région d'Edjelé, à la frontière algérienne. Son préambule fait référence à l'arrangement franco-italien du 12 septembre 1919, considéré comme en vigueur.

A aucun endroit du texte n'est évoqué un autre secteur de la frontière entre les deux parties qui pourrait faire l'objet d'une délimitation ultérieure pour en préciser le tracé. La France et la Libye sont apparemment satisfaites du tracé frontalier séparant leurs souverainetés respectives. Elles ne posent plus le problème jusqu'à l'indépendance du Tchad.

Le Tchad et la Libye ne posent pas davantage le problème après l'indépendance. Mieux, en signant l'accord de bon voisinage et d'amitié du 2 mars 1966, les Parties à la présente instance confirment la stabilité du règlement frontalier de 1955. L'accord de 1966 prend la relève de la convention de bon voisinage de 1955. Il présuppose, comme la convention de 1955, une ligne frontière dans l'application de ses dispositions dont je vous fais grâce. Il ne fait plus référence aux "territoires dont la France assume la défense"; c'était l'expression utilisée en 1955, mais il vise bien dans son article 1er : "la

frontière séparant le territoire du Royaume-Uni de Libye de celui de la République du Tchad".

Enfin, l'article 2 de l'accord de 1966 situe explicitement les points suivants :

- pour la Libye : Koufra, Gatroum, Mourzouk, Oubari et Ghât;
- pour le Tchad : Zouar, Largeau, Fadha.

Voilà qui met les choses au point en 1966.

Monsieur le Président, Messieurs de la Cour,

J'aborde maintenant la partie de ma plaidoirie consacrée aux moyens complémentaires d'interprétation :

- travaux préparatoires,
- circonstances dans lesquelles le traité a été conclu.

Ceci pour confirmer les résultats de l'analyse précédente car je crois qu'il est difficile de prétendre que l'interprétation proposée par la République du Tchad "conduit à un résultat qui est manifestement absurde ou déraisonnable", pour reprendre les termes de la convention de Vienne, et j'espère vous avoir convaincus que cette interprétation ne laisse pas le sens du traité ambigu ou obscur.

Monsieur le Président, de l'avis du Tchad, le recours aux travaux préparatoires présente un intérêt limité dans cette instance. Les travaux préparatoires *stricto sensu* sont peu nombreux. C'est normal. Une négociation bilatérale ne laisse pas les mêmes traces qu'une conférence multilatérale.

Il y a peu d'étapes intermédiaires avant la conclusion de l'accord final qui porte sur un ensemble équilibré de droits et d'obligations, de prestations, de concessions. Jusqu'à la dernière minute, chaque partie maintient ses positions, tantôt avec intransigeance, tantôt avec flexibilité et ceci afin d'améliorer le résultat final à son avantage. Or, nous le verrons, et sur ce point nous sommes d'accord avec la Partie libyenne, l'accord sur les frontières n'a été conclu que dans la phase ultime de la négociation.

Ajoutons en l'espèce une pénurie marquée de documents du côté libyen. Du côté français, nous disposons d'une correspondance diplomatique nourrie, des minutes des entretiens entre le premier ministre Ben Halim et le président Mendès-France en janvier 1955, des rapports parlementaires, des débats à l'assemblée nationale, au conseil de la république, à l'assemblée de l'union française. Du côté libyen, nous savons qu'il y a eu des discours du trône, nous savons qu'il y a eu des débats parlementaires. Nous imaginons qu'il y a eu correspondance diplomatique. La Partie libyenne n'a rien trouvé, n'a rien produit. Sans doute pour de bonnes raisons, je veux bien le croire, mais le fait est là.

Heureusement, nos collègues de la Partie libyenne ont retrouvé les minutes libyennes relatives à la phase ultime des négociations, du 19 juillet au 10 août 1955. Malheureusement, ils n'en ont produit que des extraits en annexe à leur mémoire. Et il a fallu toute l'insistance du Tchad, dans notre réplique, puis par une démarche formelle de notre agent pour que la Partie libyenne consente à déposer le document intégral comme production.

Sir Ian s'en défend en déclarant que ces minutes n'ont aucun intérêt. Vous me permettrez de ne pas être d'accord avec lui. Ces

minutes dont sir Ian constate qu'elles constituent "the complete documents of the libyan records" (CR 93/15, p. 33) sont intéressantes pour préciser les positions des Parties sur les frontières. Mais elles sont au moins aussi intéressantes, Monsieur le Président, par ce qu'elles ne disent pas que par ce qu'elles disent, si elles sont "the complete documents of the libyan records", au moins aussi intéressantes par leurs omissions que par leur contenu. Elles révèlent ainsi que le mandat ultérieur de négociation, souhaité par le premier ministre Ben Halim est écarté par l'ambassadeur Dejean et ne trouve pas place, nous le savons, dans le texte final. Elles infirment l'hypothèse des deux segments de frontière qui n'est évoquée à aucun moment par la Partie libyenne. Enfin, ces minutes sont en contradiction totale avec l'hypothèse d'une zone de défense confiée à la France sur les confins libyens. Le vocabulaire même employé par les négociateurs libyens, attachés à la libération du sol libyen ("libyan soil"), telle est l'expression utilisée par M. Ben Halim, exclut cette hypothèse.

Si l'hypothèse de la zone de défense avait eu le moindre crédit, vous conviendrez, Monsieur le Président, Messieurs de la Cour, qu'elle aurait au moins transpiré dans les minutes libyennes. Or je n'y trouve pas pour ma part l'ombre d'une allusion.

Nous considérons donc que c'est à vous, Monsieur le Président, Messieurs de la Cour, de juger de l'intérêt de cette production libyenne. Je pense d'ailleurs, puisque sir Ian a dit que vous n'aviez rien à cacher, que la Partie libyenne ne verra aucun inconvénient à inclure formellement le texte de l'*exhibit* 73 puisqu'il s'agit de celui-là, comme annexe à ses écritures afin d'assurer une consultation commode de cette pièce par les juges. D'ailleurs, je vous rassure tout de suite, il ne s'agit pas d'alourdir un dossier déjà fort lourd, puisqu'il s'agit d'un document assez bref, d'une douzaine de pages.

Monsieur le Président, vous me permettrez une autre remarque à propos de l'utilisation par la Partie libyenne des travaux préparatoires dans la présente affaire. C'est une fâcheuse tendance à recourir aux travaux préparatoires d'une manière autonome, au lieu de les considérer comme un moyen *complémentaire* d'interprétation, suivant en cela les prescriptions de la convention de Vienne et les enseignements de votre jurisprudence. Et je m'explique : la Partie libyenne cherche en effet à travers l'utilisation des travaux préparatoires à faire prévaloir l'intention supposée des parties sur le texte même du traité. Le mémoire libyen en offre une bonne illustration en son paragraphe 5.470. Je cite :

> "The words of Article 3 that Libya and France 'reconnaissent ... que les frontières ... sont celles qui résultent des actes internationaux en vigueur' on the date of Libyan independance *were a reflection of France's confidence in its 'thesis' that a conventional boundary already existed in 1951.* This 'thesis' had not been accepted at the United Nations (...) Nor had this 'thesis' been accepted by Libya." (Mémoire de la Libye, par. 5.470; souligné par la République du Tchad.)

En d'autres termes, et si je sais bien lire, le texte du traité consacre la thèse française, aujourd'hui tchadienne - je note cet aveu en passant ! - mais ce même texte du traité doit être réputé non-écrit puisqu'il ne consacre pas la "thesis" libyenne ! En l'espèce nos confrères de la Partie libyenne cherchent ainsi à faire prévaloir l'intention d'*une partie*, telle qu'elle résulterait des travaux préparatoires, sur la lettre claire du texte.

Cette démarche, Monsieur le Président, est en contradiction évidente avec la notion même de moyen *complémentaire* d'interprétation, telle qu'elle est posée par l'article 32 de la convention de Vienne. Comme l'a fait remarquer la Commission du droit international dans son commentaire, en présentant ce projet à la conférence de Vienne, le texte du traité doit être présumé constituer l'expression authentique de l'intention des

parties. L'interprétation a pour objet d'élucider le sens du texte et non pas d'étudier ab *initio* les intentions supposées des parties. Or, en l'espèce, il s'agit de l'intention de l'étude ab *initio* de l'intention supposée d'une partie à laquelle nos contradicteurs nous convient.

Pour dire les choses autrement, et vous me permettrez ici, Monsieur le Président, de citer la formule d'un éminent commentateur de la convention de Vienne, présent de l'autre côté de la barre :

> "The distinction between the general rules of interpretation and the supplementary means of interpretation is intended rather to ensure that supplementary means do not constitue an alternative, autonomous method of interpretation, divorced from the general rule." (I. Sinclair, The Vienne Convention on the Law of Treaties, 2e éd., p. 116).

Je ne saurais mieux m'exprimer que sir Ian en l'espèce !

Sur le contenu des travaux préparatoires, Monsieur le Président, Messieurs de la Cour, je ne m'étendrai pas de crainte de lasser l'attention de la Cour. Nous avons examiné la plupart de ces documents dans nos écritures respectives et je me permettrai d'y renvoyer à mesure. Je ferai exception pour les minutes libyennes de l'*exhibit* 73, dont j'ai parlé à l'instant, produites après la clôture de la procédure écrite, et pour les textes cités, de manière un peu contestable à mon avis, par sir Ian Sinclair à l'appui de sa démonstration.

Quel enseignement peut-on tirer de ces travaux préparatoires ?

En janvier 1955, le président Mendès-France et le premier ministre Ben Halim conviennent, s'agissant des frontières, de s'en tenir à un renvoi général aux conventions en vigueur. Mais dans les semaines suivantes, une série d'événements attire l'attention des parties sur la frontière entre la Libye et ce qui était alors l'AEF et aujourd'hui le Tchad. Du côté français, il s'agit de l'incident d'Aouzou du 28 février 1955, que nous avons examiné longuement dans nos écritures et

qui a donné lieu à des échanges diplomatiques et à des entretiens franco-libyens, au niveau de l'ambassadeur et du premier ministre et tout ceci est constitutif, à notre avis, d'un acquiescement par les autorités libyennes à la souveraineté française sur Aouzou. Par ailleurs, toujours du côté français, je note que le ministère des affaires étrangères, se penchant sur le dossier, demande au commissariat à l'énergie atomique des informations sur la probabilité de gisements d'uranium dans la bande d'Aouzou et ce dernier lui transmet le croquis suivant, où vous verrez où se trouvent les gisements éventuels d'uranium d'après le Commissariat à l'énergie atomique français, c'est-à-dire en plein dans la zone d'Aouzou, la région de Murie Idie et d'Aouzou.

Au demeurant, le ministre délégué à la présidence du conseil, Gaston Palewtski, attire à ce moment-là l'attention de M. Antoine Pinay, ministre des affaires étrangères, sur ce volet de la négociation.

Du côté libyen, les avertissements se multiplient aussi. Dès le 5 janvier, l'ambassade britannique à Paris, qui épaule les Libyens, indique l'intention du diplomate libyen, M. Jerbi, de se rendre à Rome pour consulter les archives italiennes sur le traité de 1935. C'est finalement le ministre des finances, M. Aneizi lui-même, qui fait le voyage de Rome où les autorités italiennes lui précisent le statut du traité Laval-Mussolini. Entre-temps, l'incident d'Aouzou, que je viens de rappeler, a attiré l'attention personnelle du premier ministre Ben Halim sur le problème. Les diplomates libyens étaient donc bien informés de la situation conventionnelle. Les diplomates libyens connaissaient aussi les cartes, puisqu'un militaire libyen en produit une avec le tracé du traité de Rome lors de la séance de négociation du 28 juillet 1955.

Enfin, on ne peut douter qu'au cours des nombreux contacts entre les autorités libyennes et le Foreign Office, attestés par la correspondance diplomatique fournie par les deux Parties, les excellents jurisconsultes de Sa Majesté aient attiré leur attention sur ces questions. Je ne vois donc pas ce qui permet à nos contradicteurs de dire que les Libyens ignoraient tout des textes et des cartes dans cette présente affaire. Ils en savaient en tout cas bien assez pour poser le problème. Ils n'ont pas manqué de le faire.

Le premier ministre Ben Halim a donc signé le traité du 10 août 1955 en connaissance de cause. D'ailleurs, même s'il avait commis une erreur, la Libye ne serait pas en droit d'invoquer cette erreur ou d'en tirer quelque conséquence que ce soit, puisque les circonstances étaient telles que l'Etat libyen était averti de la possibilité d'une erreur, pour reprendre l'expression utilisée dans l'article 41 de la convention de Vienne.

Au demeurant, je note que les négociateurs ont eu de nombreuses occasions de revenir par la suite sur la délimitation de la frontière méridionale, et qu'ils ne l'ont pas fait. Il n'y a pas eu méprise dans cette affaire.

Quelle est la position française en juillet 1955, à l'ouverture de la négociation finale ? Quoiqu'en pensent nos contradicteurs, c'est l'uti *possidetis*. Certes, les autorités françaises ont songé, naguère, à des rectifications de fontière à leur bénéfice et certains milieux, en 1955, notamment militaires, y songent encore. Mais les autorités responsables de la négociation y ont renoncé car elles se sont avisées que, dans un contexte général défavorable à la France, j'y reviendrai tout à l'heure, la rectification demandée risquait de se faire à son détriment en exhumant le traité Laval-Mussolini et donc de se retourner contre les négociateurs français eux-mêmes. Car, Monsieur le Président, Messieurs de la Cour, c'est la crainte de la ligne de 1935, *seule* alternative évoquée dans les documents diplomatiques de l'époque (réplique de la Libye, pièces, vol. 3, n° 6; lettre du ministre de la France d'Outre-Mer au ministre des affaires étrangères du 10 février 1955, p. 5; note sur la frontière méridionale de la Libye de février 1955, p. 2; lettre du ministre délégué à la présidence du conseil au ministre des affaires étrangères, p. 21), qui motive la diplomatie française en cette affaire. Aussi les instructions données à la délégation française en juillet 1955 ne sont pas d'éviter une délimitation de la frontière du Tibesti, mais contraire de l'obtenir sur la base des traités de 1899, de 1902 et de 1919. Ce que les instructions interdisent, et il faut le préciser, c'est de demander une revision de la ligne frontière qui pourrait, je viens de le dire, s'opérer au détriment de la France, se retourner contre les intérêts français. Et ceci ressort clairement des documents cités par sir Ian Sinclair lui-même. Vous me permettrez de les prendre dans l'ordre chronologique.

D'abord, la lettre du gouverneur général de l'AEF en date du 2 mai 1955, le gouverneur général est un fonctionnaire d'autorité, connaissant bien le terrain, on l'a dit, mais n'ayant pas compétence pour engager la France dans les relations internationales. C'est cette considération qui nous a conduit à relativiser l'importance de cette correspondance et certainement pas, je rassure la Partie libyenne, une appréhension quelconque quant au contenu de la lettre. Jugez-en par vous-mêmes, Messieurs de la Cour.

Pour sir Ian Sinclair, cette lettre confirme que :

> "neither France nor Libya wished to discuss, far less agree upon, the course of the hitherto undelimited boundary between Libya and Chad east of Toummo" (CR 93/15, p. 39).

Or qu'est-ce que je lis dans la lettre du gouverneur général de la France d'Outre-Mer :

> "j'estime en effet que les futurs accords franco-libyens ne devront laisser subsister aucun doute sur le tracé de la frontière" (mémoire de la Libye, "Annexe : Archives françaises", n° 169).

qu'est-ce que je lis plus loin :

> "Laisser planer la moindre équivoque sur les limites de l'AEF et de la Libye, serait donc fâcheux sur le plan politique comme pour la sécurité des confins." (Mémoire de la Libye, "Annexe : Archives françaises", n° 171.)

Et le gouverneur général conclut en disant qu'il convient de prendre "pour seules bases les traités en vigueur à la date de la création de l'Etat Libyen" (mémoire de la Libye, "Annexe : Archives françaises", n° 171).

Le gouverneur général de l'AEF, fonctionnaire important dont le rôle est souligné par la Partie libyenne, estime donc indispensable de confirmer sans équivoque le tracé de la frontière entre Toummo et le Soudan anglo-égyptien. Et ceci sur la base des traités en vigueur.

Ensuite sir Ian fait état des projets emportés à Tripoli par l'ambassadeur Dejean dans la négociation finale. Le texte de ce document

d'archives montre qu'il s'agit clairement d'un document de travail avec des hypothèses diverses, sir Ian en a évoquées certaines, et des annotations manuscrites, sans doute de la main du négociateur. Vous trouverez le document avec les annotations manuscrites dans la pièce 6 de la réplique libyenne.

Parmi les différentes variantes de ce document de travail, il en est une que sir Ian a omis de signaler celle qui prévoit que

> "la délimitation des frontières franco-libyennes est fixée par les documents figurant en annexe à la présente lettre".

Le principe de l'annexe I y apparaît donc. Ce projet est très proche du texte définitivement retenu.

Mais sir Ian préfère insister sur l'autre variante, celle qui prévoit une délimitation par convention ultérieure à l'est de Toummo, variante qu'il a citée intégralement. Monsieur le Président, il est dommage que sir Ian ait "nettoyé", si je puis dire, le texte des mentions manuscrites car, en regard de ce projet d'article, j'observe un grand point d'interrogation manuscrit qui aurait mérité d'être signalé, voire commenté.

Mais je n'attache pas plus d'importance que cela à ces documents qui, visiblement, étaient une série d'esquisses préparées par les services.

En revanche, ce qui est important, ce sont les instructions données aux membres de la délégation par le Gouvernement français.

Pour sir Ian :

> "The French delegation to the second phase of the negociations were under instructions not to enter into substantive discussions with the Libyan delegation about the boundary east of Toummo." (CR 93/15, p. 33.)

Quelles instructions, je vous le demande ?

Je lis sous la plume d'Antoine Pinay, ministre des affaires étrangères, à propos de la question de la frontière du Tibesti, le 14 mai 1955, que le règlement de cette question :

> "serait l'un des résultats les plus importants à attendre d'une heureuse issue des prochaines négociations franco-libyennes" (réplique de la Libye, annexe 6.6.).

Je lis sous la plume de l'amiral Champion, en date du 12 juillet 1955, l'instruction suivante du ministère de la défense nationale, pour le colonel de Sèze, membre de la délégation à Tripoli :

> "Premièrement : aucune signature d'accord franco-libyen ne devra intervenir sans être accompagnée d'un accord précis sur la délimitation de la frontière, c'est-à-dire sans l'acceptation par les deux parties d'un texte précis." (Réplique de la Libye, annexe 6.6.)

Enfin, je lis dans la lettre du ministre des affaires étrangères lui-même, Antoine Pinay, répondant le 23 juillet 1955 au ministre de la France d'Outre-Mer qui s'inquiète de connaître le contenu des instructions de la délégation française lors des négociations de Tripoli, les précisions suivantes :

"J'ai l'honneur de vous confirmer à cette occasion que les *instructions* données à notre délégation lui prescrivent de baser son attitude, dans la discussion de la délimitation des frontières franco-libyennes, sur les textes internationaux en vigueur au moment où a été proclamée l'indépendance libyenne (24 décembre 1951), c'est-à-dire la déclaration franco-britannique du 21 mars 1899, admise par l'Italie le 1er novembre 1902 (échange de lettres Barrère-Prinetti) et interprétée par la convention franco-britannique du 8 septembre 1919, ainsi que les accords franco-italiens du 12 septembre 1919." (Réplique de la Libye, annexe 6.6.)

D'ailleurs - et quoi qu'en dise mon honorable contradicteur - les diplomates français considèrent bien à l'issue de la négociation, que la frontière du Tibesti a été délimitée. C'est l'avis exprimé par l'ambassadeur Dejean, qui conduit la délégation française, dès le 9 août 1955, à la veille de la signature du traité :

"Le Gouvernement libyen ayant d'autre part renoncé à invoquer les accords Laval-Mussolini, l'ensemble de cette frontière peut être considéré comme délimité." (Réplique de la Libye, annexe 6.6.)

Ceci est confirmé dans les appréciations ultérieures citées, bien qu'incomplètement, par sir Ian Sinclair. Ainsi, je lis dans la note du service du levant du 15 juillet 1958 (citée par sir Ian, CR 93/15, p. 53)

"De Toummo au Soudan

La frontière dans ce secteur résulte de divers documents diplomatiques repris dans l'annexe I du traité de 1955. Elle est définie par deux lignes géométriques tracées entre des points déterminés par leurs coordonnées astronomiques. Aucune difficulté ne devrait donc se présenter dans cette région." (Réplique de la Libye, annexe 6.9.)

Enfin, je reprends la note du 11 février 1960, toujours citée mais incomplètement par sir Ian (CR 93/15, p. 53) :

"L'abornement de la frontière allant de Toummo au Soudan, définie en 1919 et en 1955 par deux lignes droites, ne doit soulever aucun problème." (Réplique de la Libye, annexe 6.9.)

Monsieur le Président, Messieurs de la Cour, comme vous le voyez, je ne lis vraiment pas ces textes avec les mêmes lunettes que sir Ian ! J'observe au demeurant que la plupart des extraits qu'il cite concernent

la frontière entre Ghat et Toummo quand on les regarde de plus près, alors que mes extraits des mêmes documents ont trait à la frontière entre Toummo et le Soudan et me paraissent donc plus pertinents pour notre affaire. La Cour appréciera.

Je reviens brièvement à la négociation de Tripoli en juillet-août 1955. Les informations données par les minutes libyennes de l'*exhibit* 73 recoupent suffisamment les dépêches du Quai d'Orsay pour reconstituer le fil de la négociation. S'agissant des frontières, M. Dejean propose le 20 juillet un échange de mémorandums avec cartes annexées, ainsi que la constitution d'une commission mixte. Le premier ministre Ben Halim estime à ce stade que la question des frontières n'a pas de rapport avec le traité. Mais il ajoute, selon l'*exhibit* 73 : "However, the matter will be studied and we shall return to it in a near futur." Le 26 juillet, le procès-verbal libyen constate l'existence d'une lettre interprétative sur les traités. Est-ce la liste de l'annexe I ? Sir Ian en doute. La vérité, c'est que nous n'en savons rien. Mais nous savons qu'à cette date la partie libyenne a accepté que le traité règle la question des frontières et institue une procédure de démarcation. Cela ressort du procès-verbal libyen à la date du 26 juillet. Ce qui suppose que le problème de la délimitation est considéré comme résolu. Le 28 juillet, M. Ben Halim, premier ministre, propose à nouveau d'écarter la question des frontières. A la même date, les archives françaises nous apprennent que les délégations ont achoppé sur la question du Tibesti avec la carte déployée par les experts militaires libyens. Mais l'essentiel, Monsieur le Président, Messieurs de la Cour, le 28 juillet, c'est la déclaration de M. Dejean en réponse à l'objection du premier ministre. D'après les minutes libyennes : "(He insisted) that it was not possible to conclude a Treaty without an agreement on the frontiers..."

En d'autres termes, et si je sais bien traduire en bon français, pas de frontière, pas de traité.

L'incertitude a donc persisté jusqu'au 28 juillet, mais le texte du 10 août offre la réponse puisqu'il donne sans ambiguïté satisfaction à M. Dejean sur la question des frontières, probablement en échange de concessions sur le calendrier et conditions d'évacuation des troupes françaises.

Monsieur le Président, Messieurs de la Cour,

Pour terminer, vous me permettrez quelques brèves observations sur les circonstances entourant la conclusion du traité du 10 août 1955.

Je ne reviens pas sur les délibérations des quatre puissances et de l'Assemblée générale de l'ONU, le vote de la résolution 392 (V), l'indépendance du Royaume-Uni de Libye. Mon collègue, M. Franck, examinera ces questions dans la suite de nos plaidoiries. Accédant au statut d'Etat souverain, le Royaume-Uni de Libye dispose souverainement de son statut territorial.

Il négocie ainsi successivement avec le Royaume-Uni, les Etats-Unis et la France respectivement :

- un traité d'alliance avec le Royaume-Uni,
- un traité de cession de la base militaire de Wheelus Fields avec les Etats-Unis.

En revanche, avec la France, la Libye refuse tout accord militaire. Elle a, je l'ai dit, un objectif principal qu'elle poursuit avec constance tout au long des années précédant la conclusion du traité de 1955, nous l'avons montré dans notre mémoire, et ceci jusqu'à l'ultime phase de la négociation; elle a un objectif principal : l'évacuation totale du territoire libyen, du sol libyen, par toutes les forces françaises qui s'y trouvent.

Dans un contexte dominé par la décolonisation engagée, la France est isolée dans sa volonté de maintenir quelques implantations militaires dans le Fezzan. Elle subit la pression vigoureuse des Etats-Unis, qui provoque d'ailleurs des protestations jusqu'au sein du Gouvernement français, la pression plus amicale et insidieuse du Royaume-Uni, comme l'a relevé sir Ian lui-même. De plus, le Gouvernement français doit faire face à l'opposition véhémente des partisans de la présence française en Afrique du nord, qui deviendront des partisans de l'Algérie française, et ceci aussi bien au Parlement qu'au sein même de l'administration et du gouvernement. Roger Léonard est gouverneur général de l'Algérie.

Si j'évoque cette toile de fond, c'est pour établir la réalité de l'équilibre dans la négociation.

Au demeurant, nos contradicteurs, qui avaient esquissé l'argument de la contrainte dans leurs écrits, y ont sagement renoncé. Monsieur le Président, ce ne sont pas les 500 soldats français, ou à peu près, dispersés dans l'immensité du Fezzan qui pouvaient exercer une contrainte quelconque sur Tripoli !

Je souhaiterais maintenant, Monsieur le Président, Messieurs de la Cour, aborder ici un autre sujet dont je ne sais pas s'il faut le ranger dans la catégorie des circonstances entourant la conclusion du traité. Ce sont les dispositions pertinentes de la constitution du Royaume-Uni de Libye. Ce texte fondamental de droit interne libyen date de 1951, soit quatre années avant la conclusion du traité du 10 août 1955.

Votre jurisprudence hésite à prendre en considération des dispositions de droit interne pour interpréter un acte international. Vous me dispenserez ici d'entrer dans un débat théorique qui ne me paraît pas nécessaire pour traiter de la pertinence de l'article 4 de la constitution libyenne pour notre affaire.

Sir Ian Sinclair fait grand cas de cette disposition. Il considère qu'elle éclaire d'une vive lumière l'article 3 du traité. Sir Ian a bonne vue ! Je considère pour ma part que ce texte d'une rédaction hésitante apporte peu de chose à notre connaissance de l'intention commune des parties. Tout au plus donne-t-il une indication sur l'attitude du constituant libyen en 1951. Et encore, jugez-en.

Je lis :

"Article 4. The boundaries of the United Kingdom of Libya are :
on the North, the Mediterranean Sea;
on the East, the boundaries of the Kingdom of Egypt and of the Anglo-Egyptian Sudan;
on the South, the Anglo-Egyptian Sudan, French Equatorial Africa, French West Africa and the Algerian Desert;
on the West, the boundaries of Tunisia and Algeria." (Mémoire de la Libye, vol. V, pièce 3.)

Je note que ce texte parle bien de *frontières*, de *boundaries* du Royaume-Uni de Libye avec l'ensemble des territoires mentionnés. Il n'exclut donc pas l'existence d'une *frontière (boundary)* au sud. Pourquoi ne répète-t-il pas le terme alors qu'il l'utilise pour les frontières occidentales et orientales ? Je n'en sais rien. Sir Ian non plus, à moins qu'il n'ait découvert de nouveaux documents depuis la clôture de la procédure écrite.

J'ajoute que la description de ces territoires est de nature plus politique que juridique. Le Soudan anglo-égyptien est cité deux fois : une fois à l'est, une fois au sud. L'Algérie est à l'ouest, mais le "désert algérien" - notion géographique plus que juridique - est au sud. Ces approximations cadrent mal avec une volonté juridique précise de faire un sort différent aux frontières libyennes suivant les points cardinaux.

Mais surtout, et à supposer que les constituants libyens aient ainsi marqué leur hésitation en 1951 sur leur frontière méridionale, ce qui me paraît déjà solliciter le texte, l'article 4, Monsieur le Président, n'avait sûrement pas pour objet et pour effet d'interdire aux autorités libyennes de conclure un accord frontalier dans ce secteur. Au contraire, si l'on suit l'analyse de sir Ian, l'article 4 était plutôt une invitation faite aux autorités libyennes de mettre les choses au clair. Mais, rassurez-vous, je n'irai pas si loin.

Monsieur le Président, Messieurs de la Cour, je me contenterai de constater qu'on ne peut pas tirer d'argument convaincant de la constitution du Royaume-Uni de Libye pour notre affaire.

Vous me permettrez, Monsieur le Président, à ce stade, d'examiner un quasi-vice de consentement que continuent d'évoquer nos adversaires : le dol. Les conseils libyens, depuis le début de cette affaire, mettent systématiquement en cause la bonne foi des négociateurs français :

- le contre-mémoire libyen évoque en français dans le texte un "luxe de fourberies" (p. 17),
- M. Bowett nous a dit la semaine dernière que "the tactic was to trick the Libyans" (CR 93/14, p. 29).

La Partie libyenne cherche ainsi à créer une ambiance défavorable, sans aller jusqu'à invoquer le vice du consentement, mais en espérant bénéficier marginalement de la suspicion jetée sur les négociateurs français, notamment par l'instrument de l'interprétation *contra proferentem*. Ces insinuations sont avancées sans aucun élément de preuve. Elles sont graves. Elles n'ont pas de place dans un prétoire comme celui-ci. Comme l'a dit votre Cour dans l'affaire des *Pêcheries islandaises* :

> "Un tribunal ne peut pas prendre en considération une accusation aussi grave sur la base d'une allégation générale et vague et qu'aucune preuve ne vient étayer."

Que les négociateurs français aient commis des erreurs d'appréciation, qu'ils aient parfois fait preuve de maladresse, c'est possible. Mais la présomption de bonne foi dans la conduite des parties est une règle fondamentale des relations internationales. Il n'y a pas de raison de l'écarter dans la présente affaire.

Le seul élément douteux que je trouve dans les écrits libyens est ce curieux rapport d'espionnage concernant l'ambassade de Libye à Paris lors du séjour du premier ministre Ben Halim en 1954-1955. Singulier document, Monsieur le Président, dont la provenance est incertaine. Nous savons seulement qu'il aurait été "made available" à la Partie libyenne en mai 1992; ceci, j'imagine, dans le cadre des relations de courtoisie qu'entretiennent les services de contre-espionnage.

Le Tchad n'a pas bénéficié d'un tel service de courtoisie. Au demeurant, il n'aurait su que faire d'un tel document qui, à supposer que la Partie libyenne en établisse l'origine et l'authenticité, ne révèle

qu'un excès de zèle bien inutile de la part de certains services ! Et certainement sans conséquence sur l'expression de la volonté des Parties.

La Libye n'a donc aucun motif pour invoquer le bénéfice de l'interprétation *contra proferentem*. La jurisprudence internationale n'admet, vous le savez, cette méthode d'interprétation qu'en raison de l'origine unilatérale de la clause à interpréter. Les arrêts cités dans les écritures libyennes à l'appui de leur demande concernent :

- soit les traités de paix,
- soit un prospectus rédigé par une seule partie, dans le cas des emprunts serbes. En d'autres termes, la règle *contra proferentem* ne trouve d'application que dans le cas du "contrat d'adhésion" - pour reprendre l'expression du tribunal arbitral dans l'affaire Aramco.

Nous ne sommes pas dans un tel cas de figure. Le traité du 10 août 1955 a été longuement, et parfois âprement, négocié entre les deux parties. Ceci vaut pour l'article 3 et l'annexe I comme pour le reste du traité. Nos contradicteurs en sont du reste tellement conscients qu'ils sont obligés de distinguer, dans l'annexe I, entre la première partie du texte, qui aurait été dictée de manière unilatérale par la France, et la seconde partie du texte, concernant le tracé entre Ghat et Toummo qui aurait fait l'objet d'une "négociation substantielle". Voilà qui est bien alambiqué !

Mais surtout, Monsieur le Président, Messieurs de la Cour, voilà qui n'est pas très convenable. La Libye renonce à évoquer les vices de consentement - erreur, dol, contrainte - parce qu'elle est bien incapable d'en établir la réalité.

Mais elle ne renonce pas pour autant à la stratégie du soupçon, espérant ainsi récupérer à la marge l'avantage qu'elle n'a pu marquer directement.

Messieurs, "il faut qu'une porte soit ouverte ou fermée". Ce n'est pas seulement le titre d'une comédie d'Alfred de Musset, c'est aussi une règle de droit international en matière de vices de consentement.

Il me reste un dernier point à évoquer : l'enregistrement tardif du traité. Sir Ian Sinclair a cherché à y voir un doute de la France quant aux effets juridiques du traité. S'il s'était agi, dit-il, d'un traité fixant les frontières, la France aurait fait diligence pour son enregistrement comme elle l'a fait pour l'accord de 1956. Dans cette affaire, l'indolence française montre donc bien qu'il ne s'agit pas d'un traité frontière, *quod erat demonstrandum*. Puis-je suggérer une explication beaucoup plus simple et qui ressort des documents produits par la Partie libyenne dans sa réplique. En 1961, la direction d'Afrique Levant du ministère français des affaires étrangères s'inquiète du non-enregitrement du traité du 10 août 1955 et demande des explications au service compétent. Enquête faite, la procédure d'enregistrement a bien été engagée auprès du service du Secrétariat des Nations Unies. Mais elle a été interrompue, la France n'ayant pas pu répondre au questionnaire du Secrétariat de l'ONU sur l'existence de réserves au traité. Et le service précise par lettre du 27 août 1962

> "L'établissement de cette attestion ne poserait aucun problème si les négociateurs, MM. Dejean et Ben Halim n'avaient procédé le 10 août 1955 à un double échange de lettres secrètes qui n'ont naturellement pas été communiquées au Secrétariat général de l'ONU."

En fait, ces lettres secrètes concernaient semble-t-il d'une part le calendrier d'évacuation des troupes françaises et d'autre part le montant de la contribution financière annuelle de la France à la Libye. Une correspondance diplomatique avec la Libye s'ensuit jusqu'en 1963 puis l'affaire s'arrête là. Entre-temps et notamment du fait de l'indépendance successive du Tchad, du Niger et de l'Algérie, la France a perdu tout intérêt juridique dans l'affaire et le ministère est sans doute réticent à avouer l'existence de lettres secrètes, question délicate note le service juridique dans le dossier. Il faut attendre la présente affaire et la démarche de la République du Tchad pour réveiller la Belle au Bois Dormant c'est-à-dire l'article 102 de la Charte.

Monsieur le Président, Messieurs de la Cour,

Pour conclure sur les problèmes que pose l'interprétation du traité du 10 août 1955, permettez-moi une brève considération sur les méthodes d'interprétation. Pour aller à l'essentiel, et pour la clarté de l'exposé, j'ai adopté une ligne de démonstration analytique et un peu scolaire.

Je n'ignore pas, Monsieur le Président, que votre jurisprudence, plus nuancée, procède plutôt par synthèse, hésite devant les hiérarchies un peu artificielles quant aux méthodes d'interprétation et privilégie une analyse globale que j'oserai appeler structurelle, considérant l'ensemble du matériau à interpréter comme une structure logique dont chaque élément trouve sa signification rapportée à l'ensemble de la structure.

Ce faisant, Monsieur le Président, Messieurs de la Cour, vous rejoignez les principes de la linguistique, telle que Ferdinand de Saussure en a posé les fondements. Ou, pour dire les choses autrement, et dans une autre tradition, vous suivez ce que sir Gerald Fitzmaurice

appelait naguère le principe d'intégration[1], en lui donnant d'ailleurs une portée peut-être plus vaste que sir Gerald ne lui accordait. Or, il me semble que la caractéristique de la thèse tchadienne est de répondre aux exigences du principe d'intégration.

Le texte de l'article 3, les annexes, les autres articles, le préambule, les conventions particulières, sont éclairés par l'objet et le but du traité, confirmés par les travaux préparatoires et par les circonstances entourant la conclusion du traité. En revanche, nos contradicteurs ont le plus grand mal à satisfaire au principe d'intégration. Ils sont obligés de donner un sens particulier à chaque disposition du texte ou du contexte qui les embarrasse, ils sont obligés d'inventer des hypothèses ingénieuses, insolites pour expliquer le sens de tel mot, de tel article, le mystérieux mandat de négociation, l'artificielle division de la frontière en deux segments, ou encore cette curieuse zone de défense dont les limites incertaines ne coïncideraient pas avec celle de la souveraineté libyenne.

En d'autres termes, la Partie libyenne semble-t-il, s'ingénie par des tentatives d'interprétation partielle de tel mot ou de telle expression, de priver le traité du 10 août 1955 de son effet utile dans certaines de ses clauses essentielles. Or, votre Cour l'a rappelé à propos de la composition du comité de sécurité maritime de l'OMCI l'Organisation intergouvernementale consultative de la navigation maritime :

> "C'est une règle d'interprétation reconnue que les clauses d'un traité doivent non seulement être envisagées dans leur ensemble, mais encore s'interpréter de façon à éviter, autant que possible, de priver aucune d'elles de son effet utile au bénéfice des autres." (*Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime, C.I.J. Recueil 1960, op. cit.*, p. 187.)

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[1] Sir F. Fitzmaurice, *BYBIL 33, 1957, p. 211.*

Pour notre part, nous n'avons pas eu besoin de formuler de telles hypothèses insolites, il nous a suffi de mette en oeuvre logiquement les éléments du texte en relation les uns avec les autres pour que la structure du traité s'éclaire de sa propre logique. Nous aurions, du reste, hésité à avancer des suppositions sans fondement dans le texte, en nous rappelant le *caveat* adressé par la Chambre de votre Cour dans une affaire récente :

> "aucune des considérations mises en avant par le Honduras ne peut prévaloir sur l'absence, dans le texte, de toute mention spécifique" (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)*, *C.I.J. Recueil 1992*, p. 586, par. 380).

La République du Tchad prie donc respectueusement la Cour d'appliquer le traité du 10 août 1955 pour lui adjuger ses conclusions. Point n'est besoin d'aller plus loin, sous réserve des explications complémentaire que vous apporterons dans un instant MM. Franck et Pellet. Nous sommes en effet convaincus que le titre territorial reconnu au bénéfice du Tchad par le traité du 10 août 1955 se suffit à lui-même. Mais par déférence pour la Cour et par courtoisie pour nos honorables contradicteurs, nous développerons les deux théories subsidiaires du Tchad dans les jours à venir.

Je vous remercie, Monsieur le Président, Messieurs de la Cour, pour l'attention que vous avez apportée à cette trop longue plaidoirie, et vous prie Monsieur le Président, peut-être après l'interruption de rigueur d'appeler à la barre M. Thomas Franck.

The PRESIDENT: Thank you very much Professor Cot. We will take our break now and then Professor Franck will take the floor. Thank you.

L'audience est suspendue de 11 h 20 à 11 h 40.

The PRESIDENT: Please be seated. Professor Franck.

Mr. FRANCK:

The opposability of the line to Libya on the basis of the 1955 Treaty

The compatibility of the 1955 Treaty with the situation at Libya's independence and with General Assembly resolution 392 (V)

Mr. President, distinguished Members of the Court:

1. It is an honour and great responsibility to appear before you for the first time. This institution represents humanity's most auspicious aspirations for peace, civility and the triumph of principle over the illusion of expediency. Permit me, at the outset, to place my part of Chad's argument in the overall context of Chad's case.

2. Chad contends, as Professor Cot has pointed out, that its boundary with Libya is described in the Libyan-French Treaty of 1955, specifically by Article 3 and Annex I. Chad also contends that, by ratifying the 1955 Treaty, Libya and France did not invent a boundary but, rather, accepted the continuing validity of the line resulting from the instruments listed in the Treaty's Annex I. In Chad's view, the boundary provisions of the 1955 Treaty constitute a sort of "renewal of vows" in the light of changed circumstances.

3. In other words, there are two book-ends upholding this boundary. At the one end are the Agreements of 1898, 1899, 1902 and 1919. At the other end is the Treaty of 1955. Between these book-ends stand various confirming effectivities and events. Among the most important of these is the brief period of Libya's decolonization. The evidence of what happened between 1948 and 1952, when Libya was a ward of the United Nations, is of major significance. It is extrinsic evidence of intent: what the members of the United Nations had in mind as they

brought Libya to independence. Both Libya and Chad agree to that. They differ fundamentally, however, as to what the extrinsic evidence signifies.

4. The period of United Nations tutelage was the first big step in the era of global decolonization, a time when so much important law was being made. In 1945, at the San Francisco Conference, it had been thought that the United Nations would accomplish two great tasks: disarmament and decolonization, and that it was thought that while disarmament might take a couple of decades, decolonization would probably take a century. The reverse proved to be the case, and the orderly and rapid decolonization of the non-Western world was accomplished, in part, because of the strength, passion and consistency with which the United Nations - both the political organs and this Court - and the new nations themselves, stuck to important guiding principles like *uti possidetis*, territorial integrity and self-determination. This brief but dynamic era of decolonization began with United Nations tutelage of Libya between 1948 and 1952. It continued through the independence of Chad and some bits and pieces remain as unfinished business. All Africa, indeed all nations, look anxiously now to this tribunal to uphold this new law of decolonization which began to be instituted during the period of the Assembly's tutelage of Libya.

5. What happened in this space? Did the United Nations bring its first ward to independence without key borders, without a fixed territory, without a known population? Chad believes that the United Nations did a better job than that. While the Assembly is not a legislative body, nevertheless, in supervising Libya's progress to independence, it exercised, under the Italian Peace Treaty, what amounted to legal powers. It was by resolution of the Assembly that Libya's

tutelage was formally ended in 1952, and the new nation was welcomed into the community of sovereign States. In the course of exercising its authority, the Assembly had presented to it, by France, repeatedly, a clear and uncontroversial definition of Libya's southern frontier, a definition in which the United Nations members acquiesced. They did this with the caveat that if there were any unforeseen differences or problems, then France and Libya should resolve them peacefully by negotiations after Libya's independence.

6. This brief era during which the United Nations prepared Libya for independence did not of course ignore the question of boundaries. As the International Court of Justice Chamber said in the 1986 *Frontier Dispute, Judgment* (*I.C.J. Reports 1986*, p. 565), States normally come to independence in accordance with "the 'photograph' of the territorial situation then existing ..." (*idem* at p. 568). Just such a "photograph" was prepared during the period of United Nations tutelage and it was taken when the United Nations General Assembly ratified Libyan independence on 1 February 1952.

7. Now, the concept of a photograph is, of course, metaphorical. But it serves to alert us to the power of the Assembly to capture Libya's new reality in such a way that we can still see today what the nations of the United Nations saw on 1 February 1952, when, by resolution 515 (VI), they congratulated Libya on its "independence". What the nations saw is what Libya got. That was the law of decolonization as practised at the time in the United Nations. Not what the Senussi Order might have seen. Not what the Sublime Port might have wished to see. Not what Mussolini coveted. And not what Libya might prefer today. What Libya inherited at that time was the uncontested border as it was "on the ground" and as it was frequently described, without contradiction, in the Assembly. Presently, I will try to demonstrate what this photograph tells us.

8. But first: Libya has also produced a "photo" of this period. Mr. President, distinguished Members of the Court, beware of that Libyan "snapshot". It has two images which are misleading. Sir Ian Sinclair has described them rightly as "key" elements in Libya's case (cf. CR 93/18, pp. 12, 18). These two elements of the Libyan snapshot are first, a couple of maps produced at the United Nations and, secondly, General Assembly resolution 392 (V) of 1950. We will pay close attention to both of these, mainly because Libya has made them so central to its case. But let me pause, first, for just a moment, to remind the Court that Chad's case rests, first and foremost, on the Treaty of 1955, not on Secretariat maps or General Assembly resolutions.

9. *First*, the maps. There are several of these published in the 1950s by the United Nations. The tale begins with United Nations map No. 241, which Libya has produced again as map No. 6 in the Judges' folder and which we have introduced as map No. 110 in Chad's Atlas and which is also found in the dossier which we produced for you this morning. This 1950 map, like later versions of it, shows an event that never happened. The Chad Memorial and Counter-Memorial indicates in great detail the story of this map, onto which Libyan counsel, both Mr. Kemal El-Maghur and Sir Ian Sinclair, have projected such significance (cf. CR 93/15, p. 20).

10. Map No. 241 did not originate with the United Nations. It has a much longer provenance, which I will only sketch in outline. In 1947, the Four Powers, as you know, invested by the Italian Peace Treaty with authority to decide the fate of Italy's former colonies, set up a Commission of Investigation to determine those colonies' future. That Commission visited all the territories, including Libya, from October 1947 to May 1948, and it issued a report in August 1948 (MC, at p. 195 (E), p. 220 (Fr.), para. 55). Immediately after the Commission's visit to Libya, a British member of the delegation to the Four-Power Commission wrote an internal memorandum, dated 7 June 1948. It notes that France had objected to a map issued for the visit to Libya.

PROJECTION No. 1

No wonder France demurred. The Commission's sketch-map represents Libya's southern border as it would have been had the Laval-Mussolini accord of 1935 come into force. The French did not gently acquiesce in such a map. They certainly did not think that this "Mussolini" line that the map projected was a concession by Italy to France, a bizarre view often advanced by Libya in these pleadings, and which my colleague, Professor Cassese, will address. The British memorandum reports that the French, on seeing the map, had pointed out that the 1935 Treaty, on which it was based, was "null and void". The memorandum adds that the British representative readily agreed with France's representation (MC at pp. 196-197 (E), pp. 221-222 (Fr.), paras. 58-63).

11. But that was far from the end of the matter. In September 1948, the Four-Power Commission reported to the United Nations Secretary-General that it had failed to reach agreement on the former Italian colonies' future. By operation of the 1947 Treaty, the question was now referred to the Third Regular Session of the General Assembly.

Nothing, nothing, in that Four-Power report even mentions Libya's southern frontier. Nevertheless, annexed to the Report is the map of Libya used for the Commission's on-site visit: that map against which France had protested.

12. But we now learn more of the map's provenance. The copy of the map attached to the Four-Power Report transmitting the issue of Libya's future to the General Assembly is kept at the United Nations Library, and it shows this map to be a reproduction of "a British Ordnance Map made from the map printed by the Italian Minister of Colonies in 1937" (MC at p. 197 (E), pp. 221-222 (Fr.), para. 62).

PROJECTION No. 2

In sum: the map had been drawn by the Italian Ministry of Colonies - *before* Italy's renunciation of the 1935 Laval-Mussolini Treaty. The copy of the map on file at United Nations Headquarters repeats what we already know from the British memorandum that I just referred to: that the French delegation had made clear to fellow members of the Commission that the map erred, that the 1935 Treaty, on which it was so evidently based, had never entered into force (MC at p. 197 (E), p. 222 (Fr.), para. 63). The map's error had thus been pointed out by the French, to the satisfaction of the British, and noted on the map itself, before the map ever got to the United Nations.

13. Once in the United Nations files, however, the map seemed to become ineradicable. One is reminded of Hughes Mearns's poem:

> As I was going up the stair
> I saw a man who wasn't there
> He wasn't there again today
> I wish, I wish he'd go away.

14. Because its unreality was matched by its persistence, we are going to refer to this as the "phantom" map. The "phantom map's" saga continues. Doubts, mainly about the frontiers of Eritrea and Italian

Somaliland (MC at p. 198 (E), p. 223 (Fr.), para. 65, and cites therein) caused the Fourth Assembly to request its Interim Committee to make a study of the former colonies' boundaries (MC at pp. 199-200 (E), pp. 224-225 (Fr.), paras. 70-73; Ann. 307). Thus, when the Assembly's Interim Committee met in January 1950, it asked the Secretariat to prepare a background study of all the borders (MC at p. 200 (E), pp. 225-226 (Fr.), paras. 72-75. Report of the Interim Committee, *Official Records of the General Assembly, Fifth Session, Supplement No. 14* (A/1388), para. 12). Libya, most recently in Professor Bowett's first oral presentation, has stressed its reliance on this "background study" (CR 93/14, p. 27, Prof. Derek Bowett). But the study is a very modest effort which, to paraphrase Sir Winston Churchill, "has a great deal to be modest about". With a mere ten days to examine all the boundaries of all Italy's former colonies, the Secretariat prepared, in evident haste, a briefing which dealt mainly with the more controversial colonial boundaries in East Africa. But it also looks at Libya's frontiers, and thereby creates some confusion. First, the Report reproduced what is essentially the "phantom" map. It is at this point that United Nations map No. 241 makes its debut.

PROJECTION No. 3

Now, however, we know its bloodline. This map No. 241 is son of the Four-Power map, grandson of the British Ordnance map, and great-grandson of Mussolini's map (MC at p. 110 (E), p. 129 (Fr.)). The Secretariat's report justifies its choice of maps by repeating the canard that the southern frontier "was fixed by the so-called 'Rome agreement' of 7 January 1935 between France and Italy" (MC at p. 200 (E), pp. 225-226 (Fr.), para. 75; Ann. 309), although it also notes France's

earlier objection based on the non-entry into force of the 1935 Treaty (MC at pp. 109-111 (E), pp. 128-130 (Fr.), para. 97; Ann. 214 and Ann. 309).

15. Mr. President, what can we make of all this? Professor Bowett has an answer. He told us, on Monday, 14 June, that "the Secretariat concluded that, as regards the southern boundary, the matter was far from clear" (CR 93/14, p. 27). *No*. The Secretariat was clearly wrong. It was wrong but clear. It had stated as a fact that Libya's southern boundary had been established by the 1935 Treaty of Rome. Whatever the Secretariat was doing during those ten days that it had to do an investigation of all the boundaries of Italy's former colonies, it certainly did not conclude, as Libya now contends, that Libya had no southern boundary. True, the report "endorses" the wrong - that is, the 1935 - line. True, being good civil servants, the Secretariat's drafters hedged their bets by punctuating the 1935 line with question marks. But those question marks do not say: *we* believe there is no boundary here. They say: this line is where we think the boundary is; but, the French have specified a different line. Map No. 241 indicates a belief that there was a boundary but some uncertainty as between two lines actually on the table: the line on the "phantom" map and the line described by France. The Secretariat, alas, picked the wrong line, in reliance on the Four-Power sketch. Libya now seeks to turn this clear but wrong line into a non-line, or even an attestation of the absence of a line.

16. After its appearance in the Secretariat's report to the Interim Committee, the phantom map next struck as map No. 256 in the first (4 September 1950) Report to the General Assembly of the United Nations Commissioner in Libya (MC, Ann. 195).

PROJECTION No. 4

There it is, United Nations map No. 256; it is also in your dossier: great-great grandson of Mussolini's 1937 map, great-grandson of the British Ordnance map, grandson of the Four-Power map, son of the Secretariat Report map No. 241. Libya, ever since its invasion of Aozou, has asked us to take this map No. 256 very seriously, making it a linchpin of its arguments. In the written version of my pleadings, I have cited many instances in which Libya took the position that map No. 256 indicated its boundary and the territory to which it was entitled (*Official Records of the General Assembly, Thirty-second Session, Plenary Meetings*, 25th Meeting, 7 Oct. 1977, para. 238; *ibid., Thirty-ninth Session, Plenary Meetings*, 27th Meeting, 11 Oct. 1984, para. 283; *ibid., Fortieth Session, Plenary Meetings*, 31st Meeting (A/39/PV.31, Provisional), 11 Oct. 1985, p. 46; *Official Records of the Security Council, Thirty-eighth Year*, 2419th Meeting, Doc. S/PV.2419 (Provisional), 23 March 1983, p. 67; *ibid.*, 2429th Meeting, Doc. S/PV.2429 (Provisional), 31 March 1983, pp. 58-60; *ibid., Fortieth Year*, 2567th Meeting, Doc. S/PV.2567 (Provisional), 30 Jan. 1985, pp. 29-30). Never mind that the Commissioner in whose report the map appears had no scintilla of jurisdiction to settle boundary disputes. Never mind that, contrary to Libya's usage, the map appeared only in the Commissioner's first (that is, the 1950) report and was omitted from his second report, the one that actually saw Libya to independence. There it is again, the "phantom" map, and this time, as you will have noticed when it was projected, it appeared as a solid line, without even the hedging question marks. Our Memorial details the bureaucratic circumstances that led to the renewed inclusion of this

erroneous 1935 line in the Commissioner's map (MC at pp. 203-205 (E), pp. 229-230 (Fr.), paras. 89-92 and cites therein). As usual, of course, it accords with the line envisaged in the 1935 Mussolini-Laval Treaty.

17. But what does all this demonstrate? Well, that the Secretariat still believed, late in 1950, more firmly and more wrongly than ever, that Libya had a southern frontier fixed by the Treaty of 1935 between Mussolini and Laval. But why would Libya want to draw our attention to an error like that? How embarrassing for Libya now, in Court, to have to admit that it had for years taken its stand on a map explicitly based on a Treaty that had never entered into force. And how much more embarrassing for Libya, that it must now somehow seek to convince this Court that this very firm, very black (albeit very wrong) line drawn by the United Nations map service on map No. 256 is evidence that the United Nations, in 1950, thought that there was no line.

18. Chad has no problems with the United Nations, 40 years ago, having published a few faulty maps. As Chad had previously pointed out, after 1958 the United Nations also published at least five more maps which are being projected now and which get the Libyan-Chadian boundary exactly right, as established by the 1955 Treaty. These are also in your dossiers (Chad Atlas, cartes nos. 141 and 149 (quatre cartes)).

PROJECTIONS No. 5, No. 6, No. 7, No. 8, No. 9

What puzzles us is why Libya deploys the faulty map now, when it has nothing to gain. The faulty map certainly does not prove that there was no boundary in 1951 because the faulty map shows a boundary. And, of course, the faulty maps do not give any credence to the Mussolini-Laval treaty on which the faulty maps rely.

19. Next, I would like to turn from the map - the "bogus part of the Libyan snapshot" - to the more "blurred portion of the snapshot" that Libyan is showing us: that is, General Assembly resolution 392 (V). Libya also attaches as great importance to this resolution as it does to the "phantom" maps, and, indeed, uses both resolution 392 and the maps to the same end. Most recently, Professor Bowett, speaking on Monday, 14 June, told us that resolution 392 (V) proves that "France totally failed to convince the United Nations that [Libya's] southern boundary was already delimited" (CR 93/14, p. 27). Or, as Sir Ian Sinclair expressed it the next day, General Assembly resolution 392 (V) demonstrates that the "General Assembly proceeded on the assumption that there *was* a portion of Libya's boundary with French territory which had not already been delimited by international agreement" (emphasis his; CR 93/15, p. 23). In Libya's opinion, resolution 392 (V) not only decided that Libya's southern border needed to be delimited but also

required Libya and France to negotiate, *de novo*, to locate Libya's southern frontier. Libya then goes on to argue that this requirement to negotiate *de novo* was not met by the 1955 Treaty, as indeed it was not.

20. But is that a fair reading of General Assembly resolution 392 (V)? Is the Assembly's resolution in conflict with the 1955 Treaty, as Libya alleges? We could, of course, now discuss what might be the legal consequences of such a conflict between a General Assembly resolution and a later bilateral treaty. I resist such digression in order not to waste the Court's time because there is no conflict. Of course, even clear evidence that the resolution absolutely does *not* say what the Libyans claim it says does not prove what the resolution *does* say. General Assembly resolutions are not contracts, and do not seek to cover every conceivable contingency. The Assembly assuredly did not ask itself: what should Libya and France do if they turn out to be in agreement about where Libya's southern border is located, but, after Libya's independence, they decide it might be useful, in the course of clearing up other matters, to state the location of their mutual frontier? No. The Assembly asked itself: what should the parties do if they have a problem? And it answered with a sensible formula: in that case, the parties should work it out through negotiations.

21. Libya wants this Court to reason as follows: resolution 392 (V) says the border is not delimited, and tells the parties to negotiate to delimit it. Libya wants the Court to believe that resolution 392 (V), thus construed, is useful to its case in two ways. *First*: since France did negotiate with Libya, France thereby must have conceded that there was no prior frontier. But this misconstrues the nature of treaties. Treaties may be precautionary, rather than remedial, and they

frequently confirm the status quo. Friendly countries sign treaties of friendship. Non-nuclear States sign the non-proliferation agreements. Neither Libya nor France, by signing the 1955 Treaty, thought they were doing anything more or less than confirming a line which already existed on the ground and which conformed with the line established by the earlier agreements designated by Annex I of that 1955 Treaty. *Second*, Libya argues, since the negotiations were brief, amicable, and confirmed the pre-existing line and the situation on the ground, the resultant Treaty violates the resolution, which requires negotiations *de novo*. But again Libya misreads the plain text of resolution 392 (V), which simply calls on Libya and France to negotiate after Libya's independence as to any part of their common frontier "not already delimited". (15 December 1950, Ann. 308. The relevant paragraph of General Assembly Resolution 392 (V) is quoted in Memorial of Chad at p. 19 (E), p. 30 (Fr.), para. 62 and Ann. 308.) The resolution, Members of the Court, of course is in your dossier. Indeed, Sir Ian Sinclair on Friday, 18 June, admitted that the resolution "refrains from stating the extent to which the boundary between Libya and French possessions in Africa is or is not delimited ..." (CR 93/18, p. 16). Nevertheless, Libya wants this Court to believe that resolution 392 (V) is the result of an Assembly which had decided that Libya's southern boundary was *undelimited*. While the resolution is open to several interpretations it certainly did not intend to say *that* and *it does not say that*. This becomes evident if one recalls very briefly the longish legislative history of that resolution.

22. There is no evidence whatsoever that the General Assembly in its discussions preceding this resolution 392 (V) thought there was any problem about Libya's southern frontier. There were, indeed, serious

boundary problems pertaining to Italian Somaliland and to Eritrea, to which resolution 392 also applies. But as to Libya, the prevailing view was expressed by Mr. McNeil, representing the United Kingdom in the 14 October 1949 meeting of General Assembly Subcommittee 17. According to the summary record: he thought that the problem being discussed - that is the frontiers of the Italian colonies - "did not in fact concern Libya because it had well delimited frontiers" (A/C.1/SC.17/SR.10, p. 3, RC, Ann. 72).

23. After further discussion, mainly of East Africa, the Fourth Assembly (MC at pp. 197-198 (E), pp. 222-223 (Fr.), para. 65), adopted resolution 289 (IV), which led to production of Secretariat map No. 241. Among many other things, that Assembly resolution requested its Interim Committee "to study the procedure to be adopted to delimit the boundaries of the former Italian colonies *in so far as they are not already fixed by international agreement* ..." (Emphasis added.) (MC at pp. 199-200 (E), pp. 224-225 (Fr.), paras. 70-73; Ann. 307.) What a deliberately flexible formula. It precisely leaves open the question whether any borders of any Italian colonies needed, to use their somewhat inelegant expression, "fixing". What more could the Assembly possibly have done? How could the Assembly profitably debate, let alone determine, the boundaries of three African nations without extensive study, or perhaps even with it? And the Assembly did not for a moment pretend otherwise. Its very sensible resolution does not decide the status of any borders. It does not even ask its Interim Committee for a *study* of the status of the borders, but only for a study of "the procedure to be adopted" as to any borders which might need to be "fixed".

24. We have already seen the results of the Interim Committee's request to the Secretariat to prepare a background paper, in ten days. While its response witlessly appended the "Mussolini" map, the text is more circumspect. As to the southern border of Libya, the Secretariat meekly ventured:

> "Further information will be required ... to determine whether the frontier is fixed in the sense of the General Assembly resolution, and if not, to study the procedure for its delimitation." (MC at p. 201 (E), p. 226 (Fr.), para. 77 and cites therein.)

If not! Does that sound as if the Secretariat had decided, and was inviting the Assembly to decide, that Libya was being groomed for independence without a southern frontier? No. The report merely calls for "further information" and "study" before the parties make any decisions: a very sensible, Secretariat-like proposal.

25. Which the Interim Committee took to heart. It refrained from acting like an imperial power, arbitrarily drawing and erasing lines across Africa. The Interim Committee's report to the Assembly, as one would expect, dealt mostly with the disputatious situation in Eritrea. As to Libya's borders - west and south (I stress that the report does not distinguish between Libya's boundaries with France) - the Committee said that in view of "the limited time available before the opening of the Fifth Session of the General Assembly" (*Official Records of the General Assembly, Fifth Session*, Supplement No. 14 (A/1388), 1950), it would merely transmit to the Assembly a United States draft resolution recommending that

> "the portion of its boundary with French territory not already fixed by international agreement be delimited, upon Libya's achievement of independence, by negotiation between the Libyan and French Governments" (MC at p. 202 (E), p. 227 (Fr.), para. 81 and cites therein).

What could be more modest or more sensible? This formula leaves it to Libya and France to decide whether they have any problem and, if so, to resolve it through negotiations. That good formula became the basis of Assembly resolution 392 (V). (15 December 1950, Ann. 308. The relevant paragraph of General Assembly resolution 392 (V) is quoted in the Memorial of Chad at p. 19 (E), p. 30 (Fr.), para. 62 and Ann. 308.)

26. Now, what did representatives of the Fifth Assembly think resolution 392 (V) meant when they voted for it? Unlike counsel for Libya, we cannot be sure. But we do have a pretty good idea what they

did not think resolution 392 (V) meant. They could not have believed, as Libya contends they did, that they were approving a resolution which actually certified the absence of a boundary between Libya and what is now Chad. Had they believed anything of the sort, would some of them not have felt moved to say so, when, in the Assembly's *Ad Hoc* Political Committee, on 13 December 1950, in the debate immediately preceding the vote on the resolution, the French representative, Mr. Naudy, explained exactly where the border was? He emphatically reiterated the invalidity of the 1935 Laval-Mussolini Treaty. With great clarity, he spelled out the agreements of the colonial era which were relevant to Libya's southern frontier, listing the Franco-Italian Agreement of 1 November 1902 which confirmed the Additional Statement of 21 March 1899 to the Franco-British Convention of 14 June 1898, complete with the supplementary Franco-British Convention of 8 September 1919. No representative disagreed with these categorical assertions. King Idriss, closely following these events as Head of Cyrenaica and future Head of Libya, did not disagree. The Italian observer at the United Nations, entitled to speak and speaking frequently, did not disagree, in contrast, for example, to both the King's and Italy's vociferous opposition to what both regarded as unjustified Egyptian claims against Libya's eastern frontier (MC at pp. 202-203 (E), p. 228 (Fr.), para. 84 and Ann. 308). More of this silent acquiescence in a moment. What is certain is that only in the light of that uniform acquiescence could France have voted for resolution 392 (V). Everything France said and did at the Assembly in December 1950 makes it clear that it would not have voted for a resolution which placed in doubt a boundary which it had so clearly and publicly defined, let alone had the effect of raising from the dead Mussolini's coveted 1935 line.

27. And permit me to say again that the 1935 line was the only alternative then on the table. Indeed, it was the only alternative on the table for the next 40 years, as we will later demonstrate. But the phantom map with its 1935 phantom line was not at this point on the table because Libya had put it there but because it had been put there by a misinformed and very harried United Nations map-service. In a way we ought to be rather grateful for the periodic reappearances of the "phantom map". Had it not been so egregiously and persistently wrong, we would know less of what the Assembly knew about Libya's borders. There would be no graduation "photograph" of Libya, showing us what the nations saw at the moment they ended their tutelage and welcomed the new nation to the ranks of sovereign States. Thanks to the map's hapless role as *agent provocateur* we have various clear expositions by France of the true circumstances pertaining to that southern frontier. If those expositions had raised doubts, they would surely have been expressed.

28. These clear expositions were historically and legally accurate and consistent, and they matched the realities "on the ground". Sir Ian Sinclair would have us look at an x-ray of the area in 1951, rather than the photograph, to show "the actual boundary situation" (CR 93/18, p. 19). I understand, of course, what he means but really I think you would need something more like cobalt testing to see any evidence of an Ottoman Empire presence or a Senussi Government in this area in 1951.

29. We have already alluded to the French representative's clear and uncontradicted statement before the Assembly's adoption of resolution 392 (V). All this is set out in greater detail in our Memorial. One more example. The First Report of the United Nations Commissioner with its appended Mussolini map, aroused France to

communicate, in unmistakable form, the real status of the boundary by circulating France's own map of Libya as part of a United Nations document (MC at p. 205 (E), pp. 230-231 (Fr.), para. 93, Ann. 321). The French representative to the Assembly's *Ad Hoc* Political Committee specifically drew its members' attention to the French report on the administration of the Fezzan, to which this correct map was attached (MC at p. 205 (E), pp. 230-231 (Fr.), paras. 93-94 and Ann. 323; MC at pp. 206-207 (E), pp. 232-233 (Fr.), para. 98 and cites therein). You also have it in your dossiers, distinguished Judges. Indeed, the French circulated the same map in the final year of supervision in their next report to the Organization, their second and final report to the Organization.

PROJECTION No. 10

France must have made an impression at last, because in the second year, the United Nations Commissioner, in making his final pre-independence report on Libya, pointedly refrained from including the phantom map (*Official Records of the General Assembly, Sixth Session, Supplement No. 17* (A/1949), 30 Oct. 1951; MC at pp. 205-206 (E), pp. 231-232 (Fr.), para. 96).

30. As this Court pointed out at the jurisdiction and admissibility phase of the 1984 *Nicaragua* decision: repeated, public, official statements become "a series of attestations" that carry great weight if they are not contradicted by a government directly affected because, and I quote the Court again, "[i]t cannot be supposed that that Government could have believed that its silence could be tantamount to anything other than acquiescence" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 410). True, in

Nicaragua the silences extended over a period of "nearly forty years" (*idem* at p. 409). While, in Libya's case we are dealing with a much shorter critical moment, the silences of Libya extended to the whole era when the transition to independence was under United Nations jurisdiction, and occurred in the face of repeated expositions by France, loud and clear, of the agreements applicable to locating Libya's southern boundary.

Later, we will seek to demonstrate that these silences also continued, at other critical times, over the next 30 years, in the face of frequent restatements - first by France, then by Chad - of the true position as to that border with Libya.

31. These silences should not be discounted as mere diplomatic courtesy or insouciance. The Assembly's periodic review of French administration of Libya's Fezzan Province, during this period of United Nations tutelage, provides an indication of how critical and suspicious other States could be of French intentions in the region. None of these sharp criticisms, however, were directed at France's position regarding Libya's southern frontier: neither its public statements nor its physical control of the region south of the border it described (MC at pp. 206-207 (E), pp. 232-233 (Fr.), para. 98 and cites therein). Both were public knowledge and yet entirely uncontested. The Soviet Union said nothing. Italy's observer said nothing. The Emir of Cyrenaica, later King Idriss of Libya, although quite vocal in opposition to Egyptian territorial claims, said nothing to contradict the French (MC at pp. 206-207 (E), pp. 232-234 (Fr.), paras. 97-100 and cites therein). The United Nations Commissioner for Libya, while opposing strenuously French suggestions for the rectification of Libya's western frontier, had nothing whatsoever to say in rebuttal to French statements regarding the southern frontier (MC at pp. 208-209 (E), pp. 234-235 (Fr.), paras. 102-104 and cites therein).

32. There is, of course, the "pauvre Libye" defence. According to Sir Ian Sinclair,

> "we know that at the end of 1951, Libya's actual knowledge of the complex history of her alleged southern boundary was extremely sparse and was largely limited to the boundary study prepared by the United Nations Secretariat in January 1950" (CR 93/18, p. 23).

That background study we have been discussing earlier in this discourse. Are we truly though to believe that Libya's Government, as it now admits, was fully aware of that Report but entirely ignorant of the ensuing debate, including the detailed French response, which the Report evoked?

33. It is these silences in response to French statements, not solely the statements by France in themselves, which should be accorded significant weight. They indicate assent to two propositions made in the repeated French assertions: (1) that the 1935 Laval-Mussolini Treaty not only had not entered into force and but was no evidence whatsoever of any reality on the ground, and (2) that the southern boundary of Libya was delimited by the texts of specified treaties of the colonial era which did correspond with the reality of the situation existing on the ground at the time of the real independence "photograph".

34. This Court, in the Norwegian *Fisheries* case, thought significant evidenciary weight should be given to an interested party's assertions of what it deemed to be the applicable legal principles in the absence of "any opposition" and "general toleration" by other States when protests "might reasonably be expected" (*Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951*, p. 138. See MC at pp. 209 (E), pp. 235-236 (Fr.), para. 106). It would be difficult to conceive of a better example of "general toleration" than the acquiescent silence of the Emir of Cyrenaica, the Commissioner for Libya and all the members of the General Assembly - Libya's legal decolonizers - in the face of France's very specific descriptions of the frontier in reaction to the repeated provocations of that map and that background study. As the 9th edition of Oppenheim so clearly states,

> "If a state acquires knowledge of an act which it considers internationally illegal and in violation of its rights, and nevertheless does not unambiguously protest, this attitude may imply a renunciation of those rights ..." (Vol. 1, Parts 2-4, Sec. 579, pp. 1193-1195).

As the Norwegian *Fisheries* and *Nicaragua (Jurisdiction)* decisions make clear, the concept of "acts" may include enunciations of applicable legal principles or of status at times and places where the applicable legal principle or the issue of status is before those to whom the attestations are directed.

35. This is not solely a matter of evidence, but also one of stability and accountability. Particularly is this so when the "act", or the assertion of governing principle, concerns a frontier. Thailand's failure to protest the French map that was at issue in the *Temple of Preah Vihear* case in part precluded subsequent challenges because the Thais had enjoyed the, as the Court said, "benefit of a stable frontier" (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 32). So also did independent Libya, for two decades, enjoy a stable frontier based on a line of which it had been made fully and frequently aware, without that line eliciting any objection whatsoever. The enjoyment of stability is a benefit for which the beneficiary is expected to pay by adhering to the rules that make stability possible. Preserving the stability of the situation as it was at the time of the "photograph" is an important concern of the law. Important in 1951. Important now.

36. Let us look once more at the real "photograph". On 1 February 1952, the Assembly unanimously passed resolution 515 (VI) which recognized Libyan independence as having been accomplished "in accordance with pertinent General Assembly resolutions". The resolution noted "with appreciation" the part played by France and Britain as the

powers administering Libya under United Nations auspices during the transition from colony to sovereignty. This is the very moment at which the "photograph" was taken. What are the parties doing and thinking at this critical moment? The Libyan representatives (Muntasser Bey and Mr. Khakkia) and the French (Mr. Beaumont) in the Assembly's *Ad Hoc* Political Committee, on the record, were expressing their entire satisfaction with the happy conclusion of the transition from colony to nation and giving assurances of their nations' mutual friendship (MC at p. 214 (E), p. 240 (Fr.), para. 124).

37. Such exchanges of bouquets is not a conduct one might expect from States with a serious boundary dispute. Notably, the Assembly's very next resolution, 516 (VI), calls on Egypt and Libya to settle "in a friendly and good neighbourly spirit the question of the appropriate adjustment" of their mutual frontier. Apparently no nation in the General Assembly thought that such a cautionary resolution was necessary regarding Libya's southern frontier with what is now Chad.

38. While it may be arguable - just barely arguable - as Sir Ian Sinclair indeed argues, that "Italian conduct prior to 1951 cannot properly be attributed to Libya" (CR 93/18, p. 23), the conduct of members of the General Assembly, while the Assembly was legally responsible for supervising Libya's transition to independence, certainly did have legal implications for Libya. And the conduct of Libya's representatives at the United Nations, as Libya was being congratulated on attaining independence, in February 1952, has legal implications. Libya had expressed no disagreement with France's statements at the United Nations on the location of its boundary. Nor did it question the presence of French forces in what came to be called the Aozou strip, although it certainly soon began to question their continued presence in the Fezzan. The location of their common frontier simply was not in dispute in 1952.

39. Not in 1955, either. The protracted negotiations preceding the conclusion of the 1955 Franco-Libyan Treaty were of course mainly about other matters: primarily, the withdrawal of France from the Fezzan. Still, while dealing with this broad range of issues, the parties naturally and sensibly decided also to include the agreed textual reference points for Libya's southern frontier. In conducting these negotiations, they had no reason to believe, as Libya now implies, that such a sensible approach, in which little time was spent on a matter - that is, the frontier - as to which there was no disagreement, could somehow have violated resolution 392 (V).

40. Libya's interpretation of resolution 392 leads it to the erroneous conclusion that the Treaty of 10 August 1955 is in violation of that 1950 General Assembly resolution (CML, paras. 3.102, 4.05). But the resolution is not contradicted; rather, its spirit is realized, by that Treaty. Resolution 392 (V) calls on the parties to negotiate if they had a problem. They negotiated to avoid any problem arising. Article 3 and Annex I of the 1955 Treaty reaffirms the well-founded understanding of the parties as it had been at the moment of independence, and carries it into the future with even greater clarity and renewed dedication.

41. Libya thinks that Chad's case is undermined by self-contradiction as to what the 1955 Treaty did. In its Counter-Memorial it asks, why can we not make up our mind: was it a new delimitation or a restatement of a prior conventional boundary or established line? Perhaps this question holds theoretical interest for lawyers, but it surely cannot have been in the minds of the Libyan or French diplomats who negotiated in 1955. Real negotiators could not have been expected to debate whether, being in agreement on the location of the frontier, the Treaty expressing that agreement constituted a

delimitation, or a recognition, that the boundary was already delimited. The diplomats and politicians working out terms of the agreement might have thought either, or even both. What matters is that they worked out an agreement the very specific intent of which, as my colleague Professor Cot has made clear, is perfectly clear to any disinterested reader, and which is essentially in accord with the texts of prior agreements and with practice "on the ground".

42. Part of the reason it is so clear is because the line they designated is also to be found in the real "photograph" taken at the United Nations on the termination of its role. There is absolutely nothing in the record to suggest that Libya in December 1951 or in February 1952 or in 1955, or in any of the intervening years, ever entertained the idea now implied by Libya, that resolution 392 (V) required the two nations to negotiate some entirely new boundary (e.g., CML, paras. 3.101-3.103), much less to adopt the one bargained for by Mussolini in 1935. All the Assembly wanted, in passing resolution 392 (V), was to ensure that any outstanding questions be settled peacefully. That is precisely what happened.

Thank you, Mr. President. I think we have enough time that we may now ask you to call on Professor Pellet, if you would.

The PRESIDENT: Thank you very much, Professor Franck. Yes, Professor Pellet.

M. PELLET : Merci beaucoup, Monsieur le Président.

Monsieur le Président, Messieurs les Juges,

1. Comme l'a rappelé tout à l'heure M. Jean-Pierre Cot, le traité du 10 août 1955 définit la frontière entre les deux pays. Il ne la définit pas de *novo*, de façon arbitraire, il ne la définit pas non plus en fonction de l'équilibre des forces sur le terrain puisque, bien au contraire, il s'agit de bouter les Français hors de Libye alors que les troupes françaises occupent encore le Fezzan. Le traité de 1955 définit la frontière par référence à des "actes internationaux en vigueur" que l'annexe I au traité énumère.

Il s'agit, en quelque sorte, d'un "traité de confirmation de frontière"; cette frontière est identique au tracé antérieur, tel que l'ont arrêté les accords préexistants.

Et c'est, Monsieur le Président, ce tracé que je vais maintenant m'attacher à décrire sur la base des actes énumérés à l'annexe I, sans chercher, pour l'instant, à démontrer l'opposabilité de ces instruments en tant que tels à la Libye. Je reviendrai assez longuement demain sur ce point mais, et je me permets d'insister, Monsieur le Président, ce problème de l'opposabilité n'a strictement aucune importance dans le cadre de notre première et principale thèse, celle à laquelle je m'en tiens pour l'instant et qui repose sur le traité franco-libyen de 1955. Ce traité fixe la frontière par référence à des actes internationaux qu'il définit comme étant en vigueur à cette fin; il aurait pu le faire aussi bien en reprenant le texte même des passages pertinents de ces accords qui, considérés ensemble, montrent clairement à quel endroit se trouve la frontière.

2. L'annexe I du traité de 1955 énumère six accords conclus par la France entre 1899 et 1919.

Certains de ces accords ne sont pas pertinents dans le cadre de l'affaire dont la Cour est saisie. Ceci n'a rien de surprenant. Il

convient, en effet, de ne pas oublier qu'il ne s'agissait pas seulement de définir la frontière entre le Tchad, qui était inclus dans l'Afrique équatoriale française et la Libye, mais aussi entre la frontière entre la Libye et les autres possessions françaises qu'étaient alors le Niger - qui faisait partie de l'Afrique occidentale française - l'Algérie et la Tunisie. Ainsi, la convention conclue le 12 mai 1910 entre la République française et la Sublime Porte ne concerne-t-elle que la frontière entre la Régence de Tunis et le *vilayet* de Tripoli. Quant à la convention franco-britannique du 14 juin 1898, elle ne présente de pertinence que comme fondement de la déclaration de 1899 qui lui est additionnelle; et puis l'arrangement franco-italien de 1919 n'a, nous le verrons, qu'une incidence tout à fait indirecte en ce qui concerne notre tracé entre la Libye et le Tchad.

Restent donc trois instruments :

premièrement, la déclaration additionnelle de 1899,

deuxièmement, les accords franco-italiens du 1er novembre 1902,

troisièmement, la convention franco-britannique du 8 septembre 1919,

Les dispositions essentielles de ces textes se trouvent dans le dossier de plaidoirie qui a été remis au Greffe ce matin et je pense, distribué aux juges et à la Partie libyenne.

3. Dans ses écritures, la Libye insiste plus et plus sur le caractère non exhaustif de cette liste et, au paragraphe 4.09 de son contre-mémoire, la Libye va jusqu'à énumérer onze accords pertinents et non cités dans l'annexe I. Cette liste libyenne est passablement disparate puisqu'on y trouve, par exemple, la déclaration franco-britannique de 1890 qui n'a tout de même qu'une incidence fort indirecte pour notre affaire ou le traité Laval-Mussolini qui n'est pas entré en vigueur... Mais le Tchad ne conteste pas du tout que certains de ces instruments présentent une indiscutable pertinence, y compris d'ailleurs le traité de 1935.

Alors, dans ces conditions, objecte la Partie libyenne, si ces textes sont pertinents, pourquoi ne pas les avoir mentionnés dans la liste de l'annexe I ? M. Cot l'a expliqué et ceci est, à vrai dire, très évident : tout simplement parce que c'était parfaitement inutile. Les six actes internationaux cités dans l'annexe I sont à la fois nécessaires et suffisants pour déterminer le tracé de la frontière libyenne depuis Ras Adjir sur le golfe de Gabès jusqu'au point triple entre le Tchad, la Libye et le Soudan; et les trois instruments que je viens de mentionner étaient et demeurent eux aussi nécessaires et suffisants pour définir la ligne frontalière qui nous intéresse. Les autres accords qu'énumère la Libye avec une étrange délectation (contre-mémoire, p. 112, par. 4.09) n'ont de pertinence dans notre affaire que pour d'autres propos.

Certains d'entre eux constituent une confirmation du tracé résultant des trois actes internationaux qui nous intéressent aujourd'hui à titre principal. Ainsi, la déclaration et le protocole franco-britanniques de 1924 ne sont utiles pour nous que parce qu'ils apportent une confirmation en ce qui concerne le point oriental extrême de la frontière tchado-libyenne à l'endroit où celle-ci rencontre la frontière du Soudan. De même, le traité Laval-Mussolini, bien qu'il ne fût jamais entré en

vigueur ou, plutôt, parce qu'il n'est jamais entré en vigueur, confirme *a contrario* le tracé actuel.

D'autres accords "pertinents" ne figurent pas dans la liste de l'annexe I pour une raison qui est encore plus simple : ils ne concernent tout bonnement pas le tracé de la frontière. Leur "pertinence", qu'encore une fois le Tchad ne conteste pas, leur pertinence tient à de toutes autres raisons : pour la plupart d'entre eux ils sont utiles pour établir l'opposabilité de la ligne frontière à la Libye indépendamment du traité de 1955. C'est le cas, par exemple, de l'échange de lettres franco-italien des 14-16 décembre 1900 qui, *à ce point de vue*, c'est-à-dire en ce qui concerne l'opposabilité dont je ne parle pas pour l'instant, forme un tout avec l'accord de 1902.

Mais, Monsieur le Président, comme je viens de le dire, ceci ne concerne que l'opposabilité de la ligne *indépendamment* du traité de 1955, c'est-à-dire en réalité que ces accords sont utiles pour la "deuxième thèse" tchadienne. Si, comme le Tchad en a la très ferme conviction, vous vous fondez sur la base du seul traité de 1955 et lui adjugez ses conclusions sur ce fondement, ces accords, qui ne sont pas mentionnés à l'annexe I, ne présentent aucune importance sinon, pour certains d'entre eux, à titre purement confirmatif. Or, je le répète encore, je me place exclusivement, pour l'instant, dans le cadre de cette première thèse qui n'invoque que le traité de 1955. Nous intéressent donc, au premier chef, les trois "actes internationaux en vigueur" que j'ai énumérés : les deux accords franco-britanniques de 1899 et de 1919 et l'accord franco-italien de 1902.

4. Monsieur le Président, nos contradicteurs aiment l'histoire; ils sont, en tout cas, grands amateurs de romans historiques. Mais la géographie est, ici, plus importante que la chronologie : peu importe que les accords auxquels se réfère l'annexe I

du traité franco-libyen aient été conclus les uns et les autres à des époques différentes; la seule chose importante est qu'ils permettent, ensemble, "mis bout à bout" comme l'a dit Jean-Pierre Cot, de déterminer le tracé de la frontière et, comme nous allons le voir, tel est bien le cas.

Au bénéfice de ces remarques préliminaires, il est non seulement possible, mais je dirais qu'il est facile, de déterminer le tracé de la frontière définie par le traité franco-libyen de 1955. Pour décrire ce tracé, je ne suivrai bien sûr pas l'ordre chronologique des actes internationaux énumérés à l'article I, mais je suivrai l'"ordre géographique" d'ouest en est, simplement parce que cet ordre est plus commode car les accords franco-britanniques de 1899 et 1919 eux aussi vont d'ouest en est.

5. Monsieur le Président, pour décrire la frontière tchado-libyenne, il est nécessaire de partir d'un point qui se trouve situé à l'ouest de cette frontière entre le Tchad et la Libye, qui se trouve sur la frontière entre la Libye et non pas le Tchad, mais entre la Libye *et le Niger*.

Avec votre autorisation, Monsieur le Président, j'aimerais d'ailleurs ouvrir une brève parenthèse sur ce point. Je viens de prononcer le mot "Niger". Sauf erreur de ma part, les avocats de la Libye ne l'ont, eux, prononcé que deux fois en vingt heures de plaidoirie. Encore fut-ce comme par inadvertance, lorsque sir Ian Sinclair, lors de l'audience du 15 juin, a cité certaines dépêches françaises de 1960 et 1961. Je comprends, bien sûr, cette réticence des conseils de la Libye : ils ne tiennent pas trop à mettre en évidence le fait que, si la Partie libyenne devait avoir gain de cause, le Niger se trouverait, lui aussi, amputé d'une partie de son territoire. C'est la partie en hachuré que vous voyez sur la carte à l'ouest du territoire actuel du Tchad.

En effet, comme le montre ce croquis, il résulterait des thèses libyennes une *territorii diminutio* d'à peu près 59 000 kilomètres carrés, je dirais même d'*au moins* 59 000 kilomètres carrés - car nous avons calculé au minimum - représentée par une bande de territoire large d'environ 80 kilomètres, et allant, depuis le nord du triangle de Toummo, jusqu'au 15e degré de latitude nord, sans d'ailleurs que l'on sache très bien comment la frontière serait définie entre Toummo et le 15e parallèle. C'est cette question que nous avons figurée par les points d'interrogation le long de cette très hypothétique frontière future entre la grande Libye et le Niger.

6. En effet, le point triple entre le Tchad, le Niger et la Libye se trouve, pour l'instant, situé sur une ligne allant de Toummo à l'intersection du tropique du Cancer avec le 16e méridien est.

Toummo ne constitue donc pas l'extrémité occidentale de la frontière tchado-libyenne; Toummo est un point de départ nécessaire pour décrire le tracé de cette frontière. Je crois que les Parties sont en principe d'accord à cet égard.

Ceci découle en premier lieu du troisième alinéa de l'annexe I au traité de 1955 lui-même et est confirmé par les indications données par deux des "actes internationaux" auxquels renvoie par ailleurs l'annexe I : d'une part, l'accord Bonin-Pichon du 12 septembre 1919 et d'autre part, l'échange de lettres Prinetti-Barrère daté du 1er novembre 1902.

7. Toummo figure en effet également sur ce que, pour éviter toute polémique inutile, j'appellerai pour l'instant "la carte de 1899" dont vous pouvez voir la projection. Cette carte figure, en pointillés noirs, à côté de la légende, la frontière de la Tripolitaine. Vous avez, Messieurs les juges, un agrandissement de cette partie pertinente de la carte dans votre dossier : c'est le document n° 2 B.

Le traité de 1955 ne renvoie pas *expressis verbis* à cette carte; en revanche, il renvoie aux accords franco-italiens du 1er novembre 1902, c'est-à-dire à l'échange de lettres entre Prinetti et Barrère portant la date du 1er novembre 1902, mais qui, comme on le sait, en réalité a été signé le 10 juillet 1902. Cet échange de lettres, à son tour, vise expressément "la frontière de la Tripolitaine indiquée par la carte annexée à la déclaration du 21 mars 1899, additionnelle à la convention franco-anglaise du 14 juin 1898".

Nous savons tous, Monsieur le Président, que la Partie libyenne voudrait gommer cette référence expresse à la carte de 1899 qui donne à la frontière "a more formal status" que celui qu'elle tirait du seul *Livre jaune*. et cette expression, "a more formal status", est tirée du mémoire de la Libye (p. 207, par. 5.95). Nous savons aussi que la Libye fait grand cas du fait que la légende figurant sur la carte n'identifie pas expressément cette ligne comme étant la frontière de la Tripolitaine; et peu importe en ce qui nous concerne pour le moment : le caractère frontalier de la ligne est attesté par le double renvoi : d'une part, à l'échange de lettres par le traité de 1955; et d'autre part, à la carte, par l'accord de 1902, qui décrit la ligne qui gêne tant la Libye comme étant " la frontière de la Tripolitaine".

Par ce double renvoi, la carte de 1899 s'est trouvée doublement intégrée "par les éléments qui constituent l'expression de la volonté (...) des Etats concernés" (*Différend frontalier, C.I.J. Recueil 1986*, p. 582. par. 54) ces Etats concernés, ce sont la France et l'Italie d'une part, la France et la Libye d'autre part.

La question de l'opposabilité de la carte, en tant que telle, à la Libye est un problème différent sur lequel je reviendrai demain mais, pour ce qui est du tracé résultant du traité de 1955, il suffit de constater que la carte de 1899 établit, sans aucun doute possible, la partie occidentale de la frontière jusqu'au tropique du Cancer : il s'agit d'une ligne droite qui part de Toummo pour aboutir à l'intersection du tropique du Cancer avec le 16^{e} degré de longitude est.

8. Toutefois, Monsieur le Président, ce segment de ligne ne constitue que pour partie la frontière entre le Tchad et la Libye; dans sa partie occidentale, ce même segment sépare la Libye non pas du Tchad, mais du Niger.

Le problème ne se posait pas avant 1930 : en effet, conformément à des arrêtés du 5 octobre 1910 et du 31 juillet 1912, le Tibesti relevait du Niger, et non pas du Tchad et, dès lors, tout le secteur aurait été nigéro-libyen. Toutefois, par un arrêté du gouverneur général de l'AEF pris le 18 février 1930 après "entente directe, dit l'arrêté, des Gouvernements du Tchad et du Niger", "les territoires du nord-ouest du Tibesti" - c'est-à-dire en fait la région de Bardaï - ces territoires furent rattachés au Tchad et, plus précisément, à la ciconscription du Borkou-Ennedi, formant ainsi le BET. Au nord, la limite du territoire fixée par cet arrêté est constituée par "la frontière italienne de la Libye" - c'est-à-dire par la ligne Toummo-tropique du Cancer, à partir du "15^{e} méridien est de Greenwich" (mémoire du Tchad, annexe 116).

Ainsi, et pour conclure sur ce point, un peu aride je dois dire, en vertu du traité de 1955 et des actes internationaux auxquels ce traité renvoie, le secteur occidental de la frontière tchado-libyenne est constitué par une ligne qui relie Toummo au tropique du Cancer; le point de départ de la frontière est situé sur cette ligne au 15e degré est de Greenwich - c'est le tripoint entre le Tchad, le Niger et la Libye; son point d'arrivée se trouve sur le tropique au 16e degré de longitude est.

9. En ce qui concerne cette intersection entre le tropique du Cancer et le 16e méridien, le passage de la frontière à ce point est attesté par deux des instruments auxquels renvoie l'annexe I au traité de 1955 : l'échange de lettres franco-italien de 1902 par le biais de la carte à laquelle cet échange de lettres se réfère, mais aussi la déclaration additionnelle du 21 mars 1899 qui indique expressément qu'"au nord-est et à l'est", "la zone française sera limitée par une ligne qui partira du point de rencontre du tropique du Cancer avec le 16e degré de longitude est de Greenwich..."

Voici, Monsieur le Président, un point fermement établi. La coïncidence entre cette description textuelle de 1899 de la frontière et le tracé cartographique qui figure sur la carte de 1899 et qui a été endossé par l'Italie en 1902, cette coïncidence ne laisse place à aucun doute. S'il devait en subsister un, il serait dissipé par le fait que toutes les cartes, absolument toutes, je parle des vraies cartes, pas de celles spécialement préparées dans le cadre de notre affaire, toutes les cartes préexistantes présentées par l'une ou l'autre Partie font toujours partir la ligne frontière de cette intersection entre le tropique du Cancer et le 16e méridien - sauf bien sûr, celles qui se fondent sur le traité Laval-Mussolini. Car, dans ce cas, logiquement, le point en question se trouve à l'intérieur du territoire libyen.

10. Monsieur le Président, puisqu'il s'agit de déterminer le tracé de la frontière *en vertu du traité de 1955*, je suis, je crois, fondé à ne pas utiliser davantage la déclaration franco-britannique de 1899 : le texte de cette déclaration a été précisé, sans aucune ambiguïté, par la convention franco-britannique du 8 septembre 1919 qui constitue l'interprétation authentique de celle de 1899. Cette interprétation a été faite par les Parties elles-mêmes, non pas implicitement, mais de la manière la plus explicite qui se puisse concevoir : "Il est entendu que la présente convention ne modifiera en rien l'interprétation donnée à la déclaration du 21 mars 1899..." Le texte de 1919 fait foi et c'est ce texte-ci qui permet de décrire le tracé de la frontière à l'est du 16e méridien en vertu de l'annexe I au traité de 1955 : à partir du tropique du Cancer, la ligne prend "une direction sud-est jusqu'au 24e degré de longitude de Greenwich au point d'intersection dudit degré de longitude avec le parallèle de 19° 30' de latitude".

Je sais bien, Monsieur le Président, que la Partie libyenne fait grand cas de la différence de tracés qui existerait entre celui qui a été fixé "en principe" par la déclaration de 1899, celui qui a été reporté sur la carte du *Livre jaune* et celui résultant de l'interprétation authentique de 1919. Je ne vais pas esquiver le débat. J'y reviendrai demain. Mais ce débat n'a aucune espèce de pertinence en ce qui concerne le tracé résultant du traité de 1955 : l'annexe I renvoie à la fois à la déclaration de 1899 et à la convention de 1919, l'une et l'autre conclues entre les mêmes parties. Quand bien même ces parties auraient modifié leur accord antérieur en ce qui concerne le point d'arrivée de la ligne, *quod non*, ce qu'elles n'ont pas fait, mais quand bien même elles l'auraient fait, c'est évidemment le tracé postérieur qui serait applicable; à la fois parce qu'il est ultérieur - *lex posterior priori derogat* - et parce qu'il est plus précis - *specialia generalibus derogant*. Je n'insiste pas puisqu'aussi bien la Partie libyenne a, la

semaine dernière, indiqué expressément, par la plaidoirie de M. Cahier, qu'elle n'avait "rien contre cette affirmation" (CR 93/17, p. 18).

Monsieur le Président, si vous acceptiez de me donner encore quatre minutes je pourais terminer complètement cette plaidoirie. Merci beaucoup.

11. L'emplacement du point terminal de la frontière entre le Tchad et la Libye, tel qu'il résulte en tout cas de la convention de 1919, cet emplacement forme le point triple entre ces deux pays et le Soudan.

Ceci résulte du protocole franco-britannique du 10 janvier 1924 délimitant la frontière du Soudan anglo-égyptien et de l'AEF. Aux termes de l'alinéa k de la section VIII de ce protocole : "A l'intersection du parallèle 19°30' et du méridien 24°, un petit tas de pierres marque l'extrémité de la frontière". Le traité de 1955 ne renvoie pas à cet instrument : c'était inutile puisque cet accord de 1924 a un caractère purement confirmatif. Toutefois, je noterai au passage, que, comme l'a dit la chambre de la Cour dans l'affaire du *Différend frontalier*, la fixation du point ultime d'une ligne frontalière "implique, comme corollaire logique (...) la présence du territoire d'un Etat tiers au-delà du point terminal..." (*Différend frontalier C.I.J. Recueil 1986*, p. 579, par. 49) et c'est ce que confirme la combinaison de la convention de 1919 et du protocole de 1924.

12. Décidément, et ceci concerne tout le tracé de la fontière dont nous parlons, point n'est besoin de raisonnement compliqué : le tracé résulte du texte même des actes internationaux auxquels renvoie le traité de 1955. Ce tracé est celui qui fait l'objet des conclusions de la République du Tchad qui le décrivent d'est en ouest et fort heureusement, Monsieur le Président, la coïncidence de ces conclusions avec le tracé que je viens de décrire est absolue ! Revoyons-le ensemble une dernière fois . Je cite les conclusions écrites de la République du Tchad :

> "du point d'intersection du 24e degré de longitude Est de Greenwich avec le parallèle 19°30 de latitude Nord, la frontière se dirige jusqu'au point de rencontre du Tropique du Cancer avec le 16e degré de longitude Est de Greenwich;
>
> - de ce dernier point elle suit une ligne se dirigeant vers le puits de Toummo jusqu'au 15e degré Est de Greenwich".

C'est exactement le tracé que j'ai pu retrouver sur la base du traité de 1955 et de lui seul.

13. Monsieur le Président, le Tchad a la conviction profonde qu'il pourrait arrêter là sa démonstration que je résume très brièvement :

Premièrement, en signant le traité du 10 août 1955, la Libye et la France n'avaient nullement pour objectif de délimiter la frontière méridionale de la Libye qui aurait, auparavant, été indéterminée. Il n'en est pas moins conforme, ce traité de 1955, à l'esprit de la résolution 392 (V) dont vient de parler le professeur Franck, en ce sens qu'il lève toute ambiguïté qui pourrait avoir subsisté quant au tracé de la frontière litigieuse.

Deuxièmement, l'article 3 du traité et l'annexe I définissent en effet la ligne frontière de manière complète et suffisante par référence à des actes internationaux pertinents que les parties ont, aux fins de la délimitation, considérés comme étant en vigueur et qui, au demeurant, étaient bel et bien en vigueur.

Troisièmement, il ressort tant du texte même du traité que de son contexte, y compris des accords ultérieurs intervenus entre les parties ou entre le Tchad et la Libye, il ressort aussi des travaux préparatoires et des circonstances dans lesquelles ce traité a été librement conclu, que telle était, en effet, l'intention des parties.

Le seul traité de 1955 suffit donc à établir le tracé de la frontière entre les deux pays. Il suffit à ce que soit réalisée "la stabilité" de la frontière litigieuse "d'une manière certaine et définitive" , pour reprendre l'expression de la Cour dans l'affaire du *Temple de Préah Vihéar* (*C.I.J. Recueil 1962*, p. 35). Il suffit, Monsieur le Président, à ce que justice soit faite.

Mais, Monsieur le Président, Messieurs les Juges, la Partie libyenne a tellement compliqué les choses, tellement "trituré", si j'ose dire, les faits et le droit. L'affaire revêt pour la République du Tchad, une

importance tellement exceptionnelle que, pour surplus de droit, les conseils du Tchad s'attacheront maintenant à établir que, même si le traité de 1955 n'existait pas, les conclusions du Tchad seraient fondées. Tel est l'objet de ce que, par commodité, on peut appeler ses deuxième et troisième thèses. Et j'aurai, si vous le voulez bien, Monsieur le Président, l'honneur d'introduire demain l'exposé de la deuxième thèse du Tchad, celle qui est fondée sur les délimitations conventionnelles de 1899 et 1919. Et je vous remercie beaucoup de m'avoir laissé ce petit supplément.

The PRESIDENT: Thank you very much, Mr. Pellet. We will adjourn now and start again at ten o'clock tomorrow morning.

L'audience est levée à 13 h

CR 99/23

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Tuesday 29 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le 29 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:	President	Sir Robert Jennings
	Vice-President	Oda
	Judges	Ago
		Schwebel
		Bedjaoui
		Ni
		Evensen
		Tarassov
		Guillaume
		Shahabuddeen
		Aguilar Mawdsley
		Weeramantry
		Ranjeva
		Ajibola
		Herczegh
	Judges *ad hoc*	Sette-Camara
		Abi-Saab
	Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. I give the floor to Mr. Pellet.

M. PELLET : Monsieur le Président, Messieurs de la Cour,

1. Il m'appartient d'introduire ce matin la présentation de ce que l'on peut considérer comme la deuxième thèse du Tchad. Elle consiste à montrer que, quand bien même la France et la Libye n'auraient pas conclu le traité d'amitié et de bon voisinage du 10 août 1955, la frontière n'en existerait pas moins et que son tracé résulterait directement des accords auxquels le traité de 1955 fait référence.

Cette «deuxième thèse», j'y insiste à nouveau, présente un caractère subsidiaire : le traité de 1955 se suffit à lui-même. Le Tchad ne présente cette thèse alternative que dans l'hypothèse où, contre son attente sincère, la Cour estimerait que le problème qui lui a été soumis en vertu de l'accord-cadre de 1989, ne peut pas être réglé par application du seul traité de 1955 dont le sens paraît pourtant tellement évident.

2. Vous ne vous étonnerez pas, Messieurs de la Cour, que le tracé de la frontière résultant de cette deuxième thèse soit identique à celui que j'ai décrit hier, puisque ce sont les mêmes instruments internationaux que ceux auxquels renvoie le traité de 1955 qui trouvent application, c'est-à-dire, pour l'essentiel, à nouveau, la déclaration franco-britannique de 1899, l'échange de lettres franco-italien de 1902 et la convention conclue entre la France et la Grande-Bretagne le 8 septembre 1919.

Il existe cependant une grande différence entre ces deux thèses : dans le cadre de la première, l'opposabilité de cette ligne frontière à la Libye tient à l'expression directe par ce pays de son consentement à être lié du fait de la ratification du traité du 10 août 1955; s'agissant de notre deuxième thèse, celle que je suis en train d'introduire, ce fondement disparaît puisque, pour les besoins de la discussion, cette thèse fait abstraction de ce traité qui est pourtant tellement fondamental. Au fond, il s'agit de se demander ce qui se passerait si le traité de 1955 n'existait pas. C'est, je le reconnais, un exercice un peu surréaliste, car ce traité existe bel et bien, mais la Partie libyenne met une telle insistance à tenter de le vider de sa substance qu'il convient de s'arrêter quelque peu sur ce qui est, je le répète, une pure

hypothèse d'école.

3. Le point de départ de tout le raisonnement est, bien sûr, que la Libye a succédé à l'Italie. En principe, elle ne le conteste pas. On ne peut, pourtant, s'empêcher de penser que la Libye a, de la succession, une conception fâcheusement sélective. Or, dans ce domaine, il n'existe pas de succession «sous bénéfice d'inventaire». Si la frontière septentrionale du Tchad était opposable à l'Italie, elle s'impose aussi à la Libye (comme, d'ailleurs au Tchad lui-même). La succession d'Etats est, comme l'a rappelé la Chambre de la Cour dans l'affaire du *Différend frontalier El Salvador/Honduras*, le véritable titre dont chacune des parties peut se réclamer (*C.I.J. Recueil 1992*, p. 389).

Encore faut-il, évidemment, pour que l'argumentation du Tchad soit fondée, que la frontière dont il se réclame ait été, avant l'indépendance de la Libye, opposable à l'Italie. En d'autres termes, il faut que les traités qui établissent cette frontière soit aient été conclus par l'Italie, soit que la frontière qu'ils établissent s'impose à l'Italie d'une autre manière. Je m'appliquerai à montrer que cette condition est remplie et que les accords de 1900 et 1902 ont fixé la partie occidentale de la frontière entre les deux pays et entraîné l'opposabilité à l'Italie du segment occidental de celle-ci entre les 16° et 24° méridiens.

4. Mon exposé s'articulera autour de deux idées. Dans un premier temps, nous verrons que, par les accords de 1900 et 1902, l'Italie a reconnu l'existence d'une sphère d'influence française au-delà de la frontière de la Tripolitaine-Cyrénaïque; dans un second temps, je m'interrogerai sur les conséquences en ce qui concerne le tracé de la frontière.

J'aborde donc le problème de :

I. LA RECONNAISSANCE PAR L'ITALIE DE LA SPHERE D'INFLUENCE FRANCAISE

et plus précisément celui de :

a) La portée de la déclaration franco-britannique de 1899

5. Durant la procédure écrite, la Libye n'avait pas contesté que, par la déclaration de 1899, la Grande-Bretagne reconnaissait à la France une zone (ou une sphère — les deux mots sont tout à fait interchangeables dans la terminologie de l'époque) d'influence. Sur ce point, les

Parties semblaient d'accord même si elles n'en tiraient pas les mêmes conséquences.

En plaidoirie, la Libye change d'avis. C'est (peut-être) son droit, mais ceci ne contribue certainement pas à clarifier le débat. Ainsi M. Sohier fait une subtile distinction entre «zone» d'une part et «sphère d'influence» d'autre part (CR 93/17, p. 28), et le professeur Crawford fait également valoir que l'article 3 de la déclaration ne créait pas, à proprement parler, une sphère d'influence en faveur de la France (CR 93/19, p. 52).

Par contre, d'autres conseils de la Libye s'en sont tenus à une position plus orthodoxe. Il en va ainsi du professeur Cahier qui, pour sa part, n'hésite pas à parler de «zone d'influence française» (CR 93/17, p. 28).

Monsieur le Président, c'est M. Cahier qui a raison contre MM. Sohier et Crawford. Il ne paraît pas douteux que la déclaration franco-britannique de 1899 a pour objet premier de concéder à la France une sphère (ou zone) d'influence.

Ceci est l'évidence, Monsieur le Président, mais la confusion entretenue par la Libye m'oblige à y revenir.

6. Que la Grande-Bretagne reconnaisse à la France, en 1899, une sphère d'influence est attesté :

— par le texte de la déclaration additionnelle,

— par son contexte,

— par ses travaux préparatoires, et

— par la pratique subséquente des parties et des Etats tiers.

Le texte d'abord. Selon l'article 3 de la déclaration — et vous devez déjà, Messieurs de la Cour, le connaître par cœur ! — «il est entendu en principe qu'au nord du 15e parallèle, la zone française sera limitée...», etc. «*La zone française...*»

Cette expression doit être lue dans son contexte et, en particulier, il faut garder à l'esprit le fait que la déclaration est *additionnelle* à la convention franco-anglaise du 14 juin 1898 fixant la délimitation des possessions françaises et britanniques et, (c'est son titre exact) «*des sphères d'influence* des deux pays à l'est du Niger». Elle renvoie, plus précisément, à l'article IV de la

convention de 1898 qui reconnaît expressément «comme tombant dans la *sphère* française les rives nord, est et sud du lac Tchad». C'est cette disposition, l'article IV de 1898, qu'il s'agit de compléter par la déclaration additionnelle qui en fait «partie intégrante».

7. Cette interprétation est confirmée par les travaux préparatoires. Je n'ai pas l'intention d'y revenir en détail et je me bornerai à rappeler que l'expression «sphère» ou «zone» d'influence revient constamment sous la plume ou dans la bouche des principaux protagonistes des négociations, qu'il s'agisse de lord Salisbury, de Cambon ou de Delcassé, le ministre français des affaires étrangères. A titre d'exemple, je cite ce dernier :

> «en arrière de la Tripolitaine, s'étendent des pays que nous réclamons comme devant être compris *dans notre sphère d'influence*, le Borkou, le Tibesti, le Ouanianga (*sic*), le Ouadaï, le Kanem...» (dépêche du 18 février 1899 annexée au mémoire de la Libye, Annexe : Archives françaises, p. 10).

De même, dans une note adressée le 14 mars 1899 à sir Thomas Sanderson, dont la Libye souligne à juste titre qu'il joua un rôle dans la négociation (réplique de la Libye, p. 102, par. 6.34), on peut lire que l'article 3 «contains a recognition that certain places fall *within the France sphere...*» (annexe 5 à la réplique du Tchad; voir aussi CR 93/16, p. 37; les italiques sont de nous).

C'est d'ailleurs bien ainsi que les Etats tiers ont interprété la déclaration franco-britannique. La Turquie, qui dans sa note du 19 mai 1899, proteste contre «la délimitation — la *délimitation*, Monsieur le Président, j' y reviendrai — de *sphères* d'influence» résultant des accords de 1890 et 1899 (mémoire du Tchad, annexe 62). L'Italie également, puisque, dans son discours au Sénat du 24 avril 1899, Canevaro, le ministre italien des affaires étrangères, décrit la déclaration du 21 mars comme délimitant la «*sphère* d'influence — l'expression y est ! — tant de la France que de l'Angleterre (réplique du Tchad, annexe 6).

Ces interprétations comportent cependant une approximation : il est certain en effet que l'accord de 1899 ne place pas sur le même plan les zones française, d'une part, et anglaise, d'autre part.

L'article 3 ne parle pas de la zone anglaise; il se borne à préciser que «la zone française sera limitée au nord-est et à l'est par une ligne qui partira du point de rencontre du tropique du

Cancer...», etc. Une zone d'influence française, donc certainement, mais pas, à proprement parler, de zone d'influence britannique de l'autre côté de la ligne; plutôt une «zone de désintérêt» française ou, comme M. Sobier l'a dit le 16 juin de manière positive, «an area of British interest», une zone d'intérêt britannique (CR 93/16, p. 56). On connaît les raisons de cette absence de réciprocité.

Ce sont avant tout les obsessions de Cambon et de Delcassé d'«éviter, comme l'écrit le ministre, dans une dépêche en date du 25 février 1899, de reconnaître en droit la situation de l'Angleterre en Egypte» (mémoire de la Libye, «Annexe : Archives françaises», p. 23), ce qui explique d'ailleurs aussi le rattachement de la déclaration de 1899 à la convention signée l'année précédente. M. Sobier d'ailleurs admet ceci dans son exposé du 16 juin (CR 93/16, p. 22-23 et 40). Lord Salisbury s'était montré fort compréhensif à cet égard; dès le 8 février 1899 il avait fait à Cambon une déclaration on ne peut plus nette :

> «I admitted [c'est lord Salisbury qui parle] that it was not so much of an object to us, as we did not attach much importance to any arrangements that were made to the north of the 15° parallel of latitude...» (Mémoire de la Libye, «Annexe : Archives britanniques», p. 1).

En revanche, les Britanniques se soucient fort de ne pas laisser la France approcher de l'Egypte — d'où la ligne dont je reparlerai tout à l'heure pour borner la zone française.

8. Je crains, Monsieur le Président, que tout ceci soit assez loin du sujet qui devrait nous occuper. Mais la Partie libyenne a fait grand cas des divergences qu'elle croit pouvoir déceler entre l'attitude de la France, d'une part, et de la Grande-Bretagne, d'autre part. Face aux protestations ottomanes ou italiennes entre 1899 et 1934, il y a peut-être des nuances dans la façon de répondre, mais je ne crois pas qu'il y ait de divergences réelles : simplement tandis que le coq gaulois use ses ergots dans les montagnes arides du Tibesti, le lion britannique, lui, se chauffe au soleil de la vallée du Nil.

Dans tous les cas, qu'il s'agisse de la déclaration de 1899 ou de la convention de 1919, la Grande-Bretagne réagit avec le plus grand flegme. Le Tchad l'a amplement montré dans ses écritures (mémoire, p. 195-197; contre-mémoire, p. 314-316, par. 8.39-8.45 ou p. 326-328, par. 8.65-8.75). Je me limite à trois exemples significatifs.

— A. Prinetti, qui s'inquiétait du partage franco-britannique de 1899, lord Currie, ambassadeur de Grande-Bretagne à Rome, donne l'assurance, par sa note du 11 mars 1902, que cet accord ne portait aucune atteinte aux droits d'autres puissances : «and that, in particular, as regards the *vilayet* of Tripoli and the Mutessariflik of Benghazi, all such rights remain entirely unaffected by it» (mémoire de la Libye, «Annexe : Archives britanniques», p. 80); tout ce que l'on peut en déduire est que le Gouvernement de Sa Majesté britannique demeure dans une prudente expectative et la note du Foreign Office du 3 février 1902, à laquelle le contre-mémoire libyen attache une importance particulière (p. 156, par. 4.103), ne dit pas autre chose; elle indique en substance : «*a priori* la déclaration de 1899 ne porte atteinte aux droits d'aucun Etat tiers, mais si tel devait être le cas, c'est aux Français qu'il convient de s'adresser» (*ibid.*, p. 73).

— Même tonalité générale dans les réactions britanniques aux protestations italiennes dirigées cette fois contre la convention du 8 septembre 1919. La note verbale du Foreign Office du 5 février 1923, en réponse à la protestation italienne du 18 décembre 1921, est significative; le professeur Cahier n'a cité qu'un extrait de la conclusion de ce document (CR 93/17, p. 34). Je crois qu'il faut la lire en entier; elle traduit bien l'état d'esprit des Britanniques :

> «The French Government, it has been ascertained, entirely share the view of His Majesty's Government that the arguments put forward in Monsieur Taliani's note under reference cannot be regarded as well founded. Moreover, His Majesty's Government understand that the French Government have in addition particular reasons for regarding the Italian standpoint as untenable.» (Mémoire de la Libye, «Annexe : Archives britanniques», p. 40.)

Toujours la même position : les Italiens ne peuvent faire valoir aucun droit mais, de toute manière, tout cela concerne les Français...

— La Grande-Bretagne, et c'est le troisième exemple, n'avait que des «prétentions» sur la région située au-delà de la sphère d'influence qu'elle avait reconnue à la France par la déclaration de 1899; encore ces «prétentions» étaient-elles peu affirmées et c'est sans états d'âme que, par l'article 3 du traité constitué par l'échange de notes de Rome du 20 juillet 1934, elle y renonce, abandonnant à l'Italie le triangle de Sarra. Notons tout de même qu'il avait fallu un accord en bonne et due forme pour cela.

Les Français, eux, ne sont pas dans cet état d'esprit. Ils entendent exercer les droits que leur confère la déclaration de 1899 et occuper effectivement la zone d'influence que la Grande-Bretagne leur a reconnue de ce fait. Ce sera chose faite en 1914. En attendant, la déclaration n'a que l'effet relatif des traités : elle lie les parties mais est *res inter alios acta* à l'écart des tiers. Je ne m'y attarde pas : quoi que veuille faire croire la Libye, le Tchad en est d'accord; il l'a écrit dès son mémoire (p. 176) et il n'a pas changé d'avis depuis lors.

A ce sujet, le Tchad peut souscrire à l'essentiel de la longue leçon de droit que le professeur Crawford a cru devoir nous donner la semaine dernière (CR 93/19, p. 46-52) : un traité reconnaissant une zone d'influence n'est pas, par lui-même, constitutif d'un titre territorial, fût-il «imparfait» (inchoate), et là encore, le Tchad n'a jamais écrit le contraire.

Un tel traité constitue cependant l'annonce que le bénéficiaire s'emploiera, par l'occupation effective, à créer un tel titre et signifie que l'Etat cocontractant s'engage à ne pas y faire obstacle. Les Etats tiers eux n'y sont nullement tenus.

b) La reconnaissance par l'Italie de la sphère d'influence française

9. Parmi ces Etats tiers, deux sont plus spécialement intéressés et donc plus particulièrement inquiets : ce sont la Turquie et l'Italie. La première a affirmé, dès 1890, ses «droits» — je mets le mot entre guillemets — sur l'*hinterland* de la Tripolitaine. Si l'on parle de droits territoriaux, ils sont, comme d'ailleurs ceux de la France, purement virtuels : il s'agit de revendications contradictoires, non opposables aux autres Etats, aussi longtemps qu'elles n'auront pas été concrétisées par, pour reprendre la formule de Max Huber, «l'exercice réel, continu et pacifique des fonctions étatiques» (affaire de l'*Ile de Palmas*, sentence de Max Huber, 4 avril 1928, *RGDIP* 1935, p. 166). Les deux puissances, la France et la Turquie, en sont conscientes et se livreront à ce qu'on peut appeler une «course au Tibesti», où elles arriveront d'ailleurs à peu près en même temps, mais la France y restera et cela fait toute la différence. D'autres conseils du Tchad développeront ceci.

10. L'autre Etat qu'inquiètent les appétits coloniaux français est l'Italie. Certes, Monsieur le Président, comme la Libye se plaît à le répéter, l'Italie n'a aucun droit sur la Libye, pas même virtuel. Elle ne peut revendiquer un quelconque *hinterland* (ou ce serait un

«*hinterland* transméditerranéen» : même les conseils de la Libye n'y ont pas songé malgré leur imagination aventureuse) et aucune puissance n'a reconnu à l'Italie la moindre sphère d'influence au nord de l'Afrique. Ce sera l'ambition première de la politique méditerranéenne du jeune Royaume. Non sans succès.

Certes, la Grande-Bretagne reste prudente et l'on ne peut que rendre hommage à la perspicacité de M. Sohier qui, prenant le contre-pied du contre-mémoire libyen (p. 156, par. 4.102), a reconnu que l'accord franco-britannique de 1912 — qui est d'ailleurs en réalité plutôt une déclaration unilatérale de la Grande-Bretagne — était «of less direct relevance» pour notre affaire que celui conclu avec la France la même année (CR 93/16, p. 56).

11. La France, qui cherche à désintéresser l'Italie dans la perspective de ses visées sur le Maroc, n'observera pas la même retenue.

Il est exact, comme l'a relevé la Partie libyenne, que l'un des objets de l'échange de lettres intervenu les 14 et 16 décembre 1900 entre Barrère, ambassadeur de France à Rome et le marquis Visconti Venosta, ministre italien des affaires étrangères, «concerned France's interests in Morocco» (CR 93/16, p. 47). Mais ce n'est qu'une partie de la vérité : certes, dans sa lettre du 16 décembre, Visconti Venosta donne l'assurance que l'Italie ne s'opposerait pas à une entreprise française au Maroc, point sur lequel la lettre de Barrère du 14 décembre est par contre muette. En revanche, l'une et l'autre lettre abordent la question du droit de l'Italie «de développer éventuellement son influence par rapport à la Tripolitaine-Cyrénaïque», comme l'écrit pudiquement le ministre italien, tandis que l'ambassadeur français précise :

> «que la convention du 21 mars 1899, en laissant en dehors du partage d'influence qu'elle sanctionne le *vilayet* de Tripoli, marque *pour la sphère d'influence française*, par rapport à la Tripolitaine-Cyrénaïque, une limite que le gouvernement de la République n'a pas l'intention de dépasser ...» (les italiques sont de nous).

Je tiens à souligner l'expression : «pour la sphère d'influence française». Elle est importante à un double point de vue : en premier lieu, cette expression montre clairement que la France et l'Italie considèrent l'une et l'autre que la déclaration de 1899 réservait à la France une sphère d'influence; en second lieu, il en résulte également que l'Italie reconnaît à la France le bénéfice de cette sphère d'influence. On voit mal en effet comment la première, l'Italie,

aurait pu se satisfaire des assurances données par la seconde, la France, selon lesquelles elle n'étendrait pas sa sphère d'influence au-delà d'une limite donnée si, en même temps, l'Italie avait récusé l'existence et la validité d'une telle sphère.

Il reste, comme M. Sohier l'a fait remarquer à juste titre il y a quinze jours (CR 93/16, p.49), que l'échange de lettres de décembre 1900, s'il pose le principe d'une extension future de l'influence de Rome en Tripolitaine-Cyrénaïque et établit la reconnaissance par l'Italie de la sphère d'influence française en dehors du *vilayet* de Tripoli, d'une part ne constitue pas un traité de frontière et, d'autre part, ne place pas les deux Etats sur un pied d'égalité puisque l'Italie reconnaît un fait accompli (la sphère d'influence française résultant de la déclaration de 1899), alors que les droits de l'Italie en Libye sont subordonnés à «une modification de l'Etat politique ou territorial du Maroc».

12. Ces deux lacunes seront comblées par l'échange de lettres des 10 juillet/1er novembre 1902 entre Prinetti, le nouveau ministre italien des affaires étrangères, et Barrère.

Trois traits sont à noter :

— en premier lieu, les deux Etats se reconnaissent mutuellement dans des termes généraux des sphères d'influence — au Maroc pour la France et en Tripolitaine-Cyrénaïque pour l'Italie, ceci, contrairement à ce qu'affirme la Libye (CR 93/16, p. 53) — qui ne parle pas de la Tripolitaine-Cyrénaïque — et à cet égard le Tchad souhaite préciser une nouvelle fois qu'il ne nie aucunement que l'expression «régions susmentionnées» qui figure dans l'accord vise, évidemment, le Maroc et la Tripolitaine; mais ce n'est pas sur cette expression que le Tchad s'appuie pour affirmer,

— et c'est le deuxième point, que l'Italie reconnaît par ailleurs l'existence d'une sphère d'influence française telle que l'établit la déclaration franco-britannique de 1899; ceci découle du renvoi en 1902 à l'échange de lettres de 1900, qui lui-même, nous venons de le voir, reconnaissait la sphère d'influence française;

— enfin, et en troisième lieu, les deux Etats s'accordent sur le tracé de la frontière de la Tripolitaine; j'y reviendrai dans un instant.

13. Auparavant, il nous faut nous assurer que les travaux préparatoires et la pratique subséquente des parties aux accords franco-italiens de 1900 et 1902 confirment l'interprétation selon laquelle ces échanges de lettres consacraient effectivement la reconnaissance mutuelle par la France d'une zone d'expansion éventuelle de l'Italie en Tripolitaine-Cyrénaïque, par l'Italie de la sphère d'influence française.

Le Tchad s'est déjà longuement exprimé sur ce point (mémoire du Tchad, p. 167 et suiv.; contre-mémoire du Tchad, p. 307 et suiv. et 322 et suiv.; réplique du Tchad, p. 61 et suiv.) et l'on ne trouve ni dans la réplique de la Libye, ni dans les plaidoiries de ses conseils, d'éléments nouveaux à cet égard.

En ce qui concerne les travaux préparatoires, il suffit de rappeler que c'est le marquis Visconti Venosta lui-même qui a exigé que soit ajouté, dans la lettre de Barrère du 14 décembre 1900, le membre de phrase suivant : «en laissant en dehors du partage d'influence qu'elle sanctionne le *vilayet* de Tripoli» (mémoire de la Libye, «Annexe : Archives françaises», p. 85); cette expression à elle seule, résume les deux aspects essentiels de l'échange de lettres qui nous intéresse : partage d'influence, *vilayet* de Tripoli.

Il faut rappeler également que, dans son discours à la Chambre des députés italienne du 14 décembre 1901, Prinetti a repris l'idée générale de l'échange de lettres de l'année précédente. Je sais bien que la Libye fait grand cas d'une précision, d'un mot, qui ne figure pas dans l'accord des 14-16 décembre 1900 (cf. CR 93/16, p. 51); le ministre italien a en effet indiqué :

> «Le gouvernement de la République [il s'agit de la France] a pris soin de nous informer que la convention franco-anglaise du 21 mars 1899 marquait pour la France, par rapport à la région attenante à la frontière orientale de ses possessions africaines et, en particulier, par rapport au *vilayet* de Tripoli, province de l'Empire turc, une limite qu'il n'avait pas l'intention de dépasser...» (Mémoire du Tchad, annexe 333.)

Pourquoi la «frontière orientale» ? Pour une raison qui apparaît plus clairement si on lit la déclaration du ministre italien Prinetti en conjonction avec le discours prononcé quelques semaines plus tard par Delcassé, ministre français des affaires étrangères, devant la chambre des députés française. M. Sohier s'est bien gardé de citer le discours de M. Delcassé alors que

les deux interventions avaient été soigneusement et étroitement coordonnées. Pourtant le discours du ministre français éclaire celui de son collègue italien en le précisant :

> «La convention africaine du 21 mars 1899 qui, enveloppant définitivement dans notre sphère d'influence les territoires du Borkou, du Tibesti, du Kanem, du Baghirmi et du Ouadaï, a relié la rive française du Congo à la rive algérienne et tunisienne de la Méditerranée, forme ainsi pour nous, par rapport aux autres pays et régions attenant à la frontière orientale [on retrouve le mot] de notre domaine africain, une limite que nous n'avons pas l'intention de dépasser...» (Mémoire du Tchad, annexe 334.)

Cette «frontière orientale» est donc constituée par la longue ligne qui, du Congo à la Méditerranée, marque la limite des possessions françaises et qui est, en effet, globalement située à l'est de celles-ci : Delcassé et Prinetti avaient, comme d'ailleurs lord Salisbury ou Cambon, une conception moins «mathématique» de la géographie que la Partie libyenne !

14. L'Italie a, par la suite, réitéré les engagements pris en 1902. Mon collègue et ami M. Cassese en parlera tout à l'heure en même temps que des circonstances qui ont entouré et suivi leur conclusion.

Certes, l'Italie a, plus tard, marqué avec une certaine véhémence, son opposition à la convention franco-britannique du 8 septembre 1919. Mais ces protestations mêmes sont significatives; elles portent sur le tracé, nouveau selon l'Italie, précisé par la convention de 1919 et ne remettent nullement en cause la reconnaissance par Rome de la sphère d'influence puis de la colonisation qui en est résultée. J'en veux pour preuve — mais ce n'est qu'un exemple parmi beaucoup d'autres — la note du 1er juillet 1932 par laquelle le Gouvernement italien constatait

> «la validité encore pleine et complète (...) de la partie des notes *(sic)* franco-italiennes des 14-16 décembre 1900 et du 1er novembre 1902 qui se réfère aux limites territoriales de l'expansion française en Afrique septentrionale par rapport à la Tripolitaine-Cyrénaïque...» (Contre-mémoire du Tchad, annexe 72.)

Dans plusieurs autres notes adressées aux Gouvernements français et britannique par celui de Rome, l'Italie rappelle les termes des accords de 1900 et 1902 et admet que ceux-ci consacraient l'existence d'une «sphère d'influence» française (l'expression y figure fréquemment) (contre-mémoire du Tchad, p. 287-288, par. 7.44) au-delà des frontières de la Tripolitaine-Cyrénaïque.

15. Par le texte des accords de 1900 et de 1902, confirmé par les travaux préparatoires et par son attitude ultérieure constante, l'Italie a donc reconnu l'opposabilité à son égard de la déclaration franco-britannique du 21 mars 1899 au moins pour ce qui est de la sphère d'influence que celle-ci reconnaît à la France.

Quelle conséquence juridique cela a-t-il, Monsieur le Président ? Une conséquence à vrai dire tout à fait essentielle : l'Italie ne peut, dorénavant, plus prétendre que la sphère d'influence française ne lui est pas opposable. A la différence de l'Empire ottoman, elle a accepté un fait qui, sans cela, ne se fût pas imposé à elle. Certes, l'Italie pourra se proclamer successeur de l'Empire ottoman, mais exclusivement dans la mesure où les droits que les Turcs revendiquaient n'empiétaient pas sur ceux qu'elle-même avait reconnus à la France. Indépendamment du fait que l'on ne succède pas à des revendications et que les prétendus «droits» de la Sublime Porte n'étaient pas davantage que des revendications comme M. Malcolm Shaw le montrera, toute autre théorie viderait l'idée même de zone (ou sphère) d'influence de toute substance; or celle-ci, comme l'a rappelé la Cour dans l'extrait de son avis consultatif rendu dans l'affaire du *Sahara Occidental* qu'a cité M. Crawford lui-même, a l'effet suivant : par un traité de sphère d'influence,

> «une partie accordait à l'autre la liberté d'action dans certaines régions bien définies, on s'engageait à ne pas intervenir dans la région que l'autre revendiquait» (*C.I.J. Recueil 1975*, p. 56).

Ces vues sont partagées par la doctrine la plus autorisée (cf. Charles Rousseau, *Droit international public*, III, *Les compétences*, Sirey, 1977, p. 199; voir aussi John Westlake, *Collected Papers*, by L. Oppenheim, Cambridge, U.P., 1914, p. 191-193 ou Thomas H. Holdich, *Political Frontiers and Boundary Making*, McMillan, Londres, 1916, p. 96-97) et la Cour permanente s'est également fondée sur la même idée dans l'affaire du *Groenland oriental* (*C.P.J.I. série A /B n° 53*, p. 73).

Il reste, Monsieur le Président, qu'il me faut encore établir quelle est la limite que les accords de 1900 et 1902 — ce dernier surtout car le précédent n'est guère précis à cet égard — quelle est la limite que ces accords imposent à l'expansion française. Tel sera l'objet, si vous me le permettez, de la seconde partie de cet exposé.

II. LA LIMITE DE LA ZONE D'INFLUENCE FRANÇAISE RECONNUE PAR L'ITALIE

a) La reconnaissance par l'Italie de la *frontière* de la Tripolitaine

16. Du fait de l'échange des lettres de décembre 1900, l'Italie reconnaît que la France est en droit d'*étendre* son influence dans la région qui jouxte la Tripolitaine-Cyrénaïque en vertu de la convention du 21 mars 1899. En ce qui concerne la limite de cette zone française, ce premier accord demeure imprécis.

Imprécis, mais pas muet. La France y admet que l'accord franco-britannique de 1899 «marque pour la sphère d'influence française par rapport à la Tripolitaine-Cyrénaïque, une *limite* que le gouvernement de la république n'a pas l'intention de dépasser». De plus, comme je l'ai rappelé tout à l'heure, quelques mots ont été rajoutés à la demande du ministre italien des affaires étrangères; Visconti Venosta avait en effet exigé et obtenu de Barrère qu'il soit précisé que «la convention du 21 mars 1899» laissait «en dehors du partage d'influence qu'elle sanctionne le *vilayet* de Tripoli». De son côté, l'Italie se réserve «le droit de développer éventuellement son influence par rapport à la Tripolitaine-Cyrénaïque».

Ainsi, en même temps qu'elle se réserve une zone d'influence en Tripolitaine-Cyrénaïque, l'Italie reconnaît à la France le droit de développer la sienne, en dehors de la limite de celle-ci (la Tripolitaine-Cyrénaïque). Toutefois l'échange de lettres de 1900 ne précise pas où se trouve cette limite. Et tel sera l'un des objets, celui qui nous intéresse ici, de l'accord de 1902.

17. Comme l'admet la Partie libyenne (CR 93/16, p. 52 et 54), c'est l'Italie qui n'était pas pleinement satisfaite de l'échange de lettres de 1900 : non seulement ses droits éventuels sur la Libye n'étaient que conditionnels, conditionnellement reconnus par la France pour être tout à fait précis, mais encore, la frontière de la Tripolitaine-Cyrénaïque n'avait pas été définie par l'accord si bien que, par ricochet, la limite de la zone d'influence française demeurait en 1900 elle aussi imprécise.

Il n'est donc pas étonnant que ce soit à la demande de Prinetti que cette limite a été précisée. Il en est résulté cette formule que l'on retrouve dans les deux lettres datées du 1er novembre 1902 et qui déplaît tant à la Libye :

«Il a été expliqué à cette occasion [il s'agit des conversations préparatoires entre Prinetti et Barrère] que, par la limite de l'expansion française en Afrique septentrionale visée dans la lettre [de Barrère] du 14 décembre 1900, on entend bien la frontière de la Tripolitaine indiquée par la carte annexée à la déclaration du 21 mars 1899, additionnelle à la convention franco-anglaise du 14 juin 1898.»

Il s'agit de la ligne sinueuse entourant la Tripolitaine et commençant à Ghadamès qui se trouve en haut et à gauche de la carte, à côté de la légende. Nous l'avons déjà vue. Et vous allez en voir l'agrandissement.

18. Je sais bien, Monsieur le Président, que la Partie libyenne conteste ceci, au prétexte qu'il s'agirait seulement d'une «wavy, dashed line, not identified on the map's legend as a boundary of any kind, which represented notionally, *what was commonly regarded at the time to be the Tripolitanian frontier*» (contre-mémoire de la Libye, p. 237, par. 4.254; les italiques sont de nous). Ce concept, fort nouveau, de «notional boundary» est assez déroutant — mais les conseils de la Libye sont de fidèles disciples de Giraudoux qui voyait dans le droit «la meilleure école de l'imagination» et je préfère ne pas les suivre sur ce terrain qui nous égarerait en vaines conjectures.

Je note en revanche que la Libye admet que cette ligne «was commonly regarded at the time to be the Tripolitanian border». L'aveu est révélateur : il existe, de par le monde, de nombreuses frontières qu'aucun traité ne consacre; elles n'en sont pas moins des frontières au sens plein du terme. Faut-il rappeler en outre que la «tolérance générale de la communauté internationale» vis-à-vis du tracé de la limite de sa mer territoriale par la Norvège a constitué l'une des bases de la solution retenue par la Cour dans l'affaire des *Pêcheries norvégiennes* (*C.I.J. Recueil 1951*, p. 139) ? *Mutatis mutandis*, il en va de même ici : comme l'indique la Libye elle-même, le tracé de la frontière tripolitaine sur la carte du *Livre jaune* n'est que la traduction cartographique de cette reconnaissance généralisée, comme l'est aussi, par exemple, la frontière identique, figurant sur la carte de Justus Perthes de 1892 et comme l'atteste, par exemple, le croquis établi en 1902 par le Foreign Office qui est reproduit à la page 206 du mémoire libyen.

La carte Justus Perthes que vous voyez projetée derrière moi appelle du reste une remarque. Comme je l'ai indiqué vendredi dernier (CR 93/21, p. 27), la Libye a reproduit,

dans sa réplique, cette carte qui figure à la page 2 de l'*Atlas cartographique* du Tchad. Mais, curieusement, la ligne frontière n'est pas identique sur les deux cartes : il semble que la Libye "ait retouchée pour faire de la ligne pointillée bordée de jaune de la carte d'origine — que le Tchad a déposée au Greffe — une ligne continue. Ceci est fâcheux, Monsieur le Président, car, du coup, cette ligne ne correspond plus à aucune légende alors qu'en réalité elle marque, comme l'indique très clairement la légende de la «vraie» carte de Justus Perthes, les «frontières coloniales turques» (*kolonialgrenzen*).

Cela va très loin, Monsieur le Président, car cette constatation fait, du même coup, justice de la légende dorée de l'*hinterland* ottoman qui, en même temps, constituerait l'objet de la souveraineté territoriale turque bien au sud de cette frontière. Non : cette souveraineté territoriale s'arrêtait bien à la frontière de la Tripolitaine, telle qu'elle était alors généralement acceptée (nous sommes en 1902); telle qu'elle figurait sur les cartes de l'époque; telle qu'elle correspondait, en effet, à l'implantation turque sur le terrain; et telle que le sous-secrétaire d'Etat italien, Mosca, reconnaissait douze ans plus tard, que la figurait, avec exactitude : «la carta che fu redatta *in seguito* alla convenzione anglo-francese» — «la carte qui fut établie à la suite» — je veux bien que ce soit «à la suite», Monsieur le Président, puisque le professeur Condorelli le dit (CR 93/17, p. 48) — à la suite donc, de la convention anglo-française de 1899 (annexe 18 à la réplique du Tchad). Mais il y a plus. Le tracé de la frontière qui nous intéresse n'est pas seulement l'objet d'une reconnaissance généralisée faite de la conviction manifestée par les cartes et du silence de tous. En l'espèce, l'Italie a explicitement, expressément et conventionnellement accepté ce tracé par l'accord Barrère-Prinetti de 1902.

Peu importe le statut juridique exact de cette carte dont les deux Parties sont d'accord pour admettre qu'elle n'avait pas été annexée à la déclaration franco-britannique de 1899 mais seulement à la publication française, au demeurant très officielle et connue des Britanniques, qu'est le *Livre jaune*. Le fait est, ainsi que l'a rappelé M. Sohier lors de sa plaidoirie du 16 juin, que c'est à la demande expresse de Prinetti que cette carte fut expressément mentionnée dans l'accord (CR 93/16, p. 54-55). En effet, comme l'indique l'ambassadeur Barrère dans une dépêche en date du 22 juin 1902, c'est le ministre qui «a

demandé qu'il soit mentionné que les frontières de nos possessions africaines du côté de Tripoli sont celles indiquées par la carte annexée à la convention franco-anglaise de 1898» (mémoire de la Libye, «Annexe : Archives françaises», p. 121). Telle est la formule générale qui a été retenue dans l'échange de lettres signé quelques jours plus tard avec, cependant, deux changements. L'un est purement formel. Il a consisté à remplacer «1898» par «1899» — il s'agissait probablement d'une simple erreur de transcription commise par Barrère ou son secrétariat ou, peut-être, comme le conjecture la Libye dans son mémoire (p. 207, par. 5.95), d'un *lapsus linguae* de Prinetti. Le second changement a plus d'importance : au lieu, comme elles l'avaient envisagé initialement, de viser «les frontières» des «possessions africaines» de la France, l'échange de lettres vise «la frontière de la Tripolitaine» indiquée sur la carte, comme si l'Italie, indifférente à ce que pouvait faire la France dans ses possessions africaines, entendait avant tout assurer sa propre expansion coloniale dans la région et, pour cela, faire définir, comme l'écrit la Libye dans son mémoire (p. 207, par. 5.95), «with more precision the boundaries of the *vilayet* of Tripoli».

Satisfaction ayant été donnée à l'Italie, «sans difficulté» comme l'écrivait Barrère dans sa dépêche du 22 juin 1902, «Prinetti's addition», pour citer à nouveau le mémoire libyen, «gave a more formal status to the wavy line, at least as between France and Italy» (*ibid*). Peu importe dès lors que la légende figurant sur la carte ne définisse pas expressément cette ligne comme la frontière de la Tripolitaine à la différence de la carte Justus Perthes dont elle s'inspire directement; aux fins de l'échange franco-italien, c'est de cela qu'il s'agit.

20. Il en découle deux conséquences :

Premièrement, l'Italie et la France reconnaissent, au moins dans leurs relations *inter se* le tracé de la frontière de la Tripolitaine-Cyrénaïque; il est celui qui résulte de la carte que vise l'accord de 1902. Certes, cet accord est *res inter alios acta* à l'égard des Etats tiers et, en particulier à l'égard de la Turquie, et le Tchad n'a jamais prétendu et ne prétend pas que la Porte soit liée par l'échange de lettres franco-italien. Mais l'Italie, elle, est liée par cet accord. La France lui reconnaît le droit de «développer sa sphère d'influence» dans la Tripolitaine-Cyrénaïque mais la frontière de celle-ci, la frontière de la Tripolitaine-Cyrénaïque, est cette

fois, précisément définie dans les rapports entre les parties. Elles peuvent certes revenir sur leur accord mais ensemble et seulement par la conclusion d'un nouveau traité. Comme le professeur Cassese le montrera tout à l'heure, un tel traité n'est jamais intervenu.

La second conséquence de l'échange de lettres de 1902 est que cette «frontière de la Tripolitaine» constitue «la limite de l'expansion française en Afrique septentrionale». La France ne peut pas empiéter sur la frontière ainsi définie mais, pour le reste, elle peut faire ce qu'elle veut. En tout cas, l'Italie lui a reconnu ce droit de faire ce qu'elle veut qui, de ce fait, est devenu opposable à l'Italie.

b) L'opposabilité à l'Italie de la limite de la sphère d'influence française

21. Vous le savez, Monsieur le Président, Messieurs de la Cour, durant les douze années suivantes, la France va, en effet, prendre possession effective de la sphère d'influence que lui reconnaissaient la déclaration de 1899 et l'accord de 1902, transformant ainsi en une véritable colonie ce qui n'était qu'une zone d'influence, une colonie virtuelle, en pointillés, si l'on veut. M. Cassese le rappellera également.

Vis-à-vis de l'Italie, cette expansion aurait pu, juridiquement, atteindre la frontière de la Tripolitaine.

Mais, à l'égard de la Grande-Bretagne, la France était liée par la déclaration additionnelle du 21 mars 1899. Celle-ci avait borné la zone française au nord-est et à l'est et, si l'Italie ne pouvait opposer cette limite aux Français, les Britanniques, eux, pouvaient se prévaloir de cette limite.

La France avait estimé, en son temps, que la ligne de 1899 elle-même était opposable à l'Italie. Mais, Monsieur le Président, comme l'a rappelé l'agent du Tchad vendredi dernier, la France est la France et ... le Tchad est le Tchad. Et une étude plus attentive l'a convaincu qu'en effet l'échange de lettres de 1902 n'avait pas limité la zone d'expansion française si ce n'est par la frontière de la Tripolitaine.

Tout au plus pourrait-on soutenir que l'Italie, dont les autorités avaient connaissance de la carte de 1899 à laquelle renvoie l'accord de 1902 et, par voie de conséquence, de la «limite des possessions françaises», qui y figure — ceci est bien dit dans la légende — ne pouvait de

bonne foi contester cette limite. La déclaration de 1899 était certes *res inter alios acta* à son égard; pas la carte que les deux parties considèrent comme y étant annexée.

Mais laissons cela et admettons qu'il faille s'en tenir à une interprétation littérale de l'échange de lettres de 1902, qui n'évoque pas cette ligne «sud-est». Dans ce cas, la liberté d'action de la France est plus grande encore : l'Italie a reconnu à la France une sphère d'influence qui, virtuellement, autorise celle-ci à établir ses possessions coloniales jusqu'à la frontière de la Tripolitaine. Ce ne sera que partiellement le cas.

22. Ce sera le cas à l'est où les Français sont déjà implantés du fait du protectorat sur la Tunisie en 1881 et de la conquête puis de l'occupation de l'Algérie. Ce sera le cas également au sud; car il faut, décidément, penser au Niger; la France y occupe effectivement la zone d'influence que lui reconnaissent les conventions de 1898 et 1899, ceci au tout début du XX[e] siècle. De ce fait, la frontière méridionale de la Tripolitaine devient aussi la frontière septentrionale de la colonie française du Niger. A cet égard, je me permets de rappeler, Monsieur le Président, qu'à l'époque le Tibesti fait partie du Niger, et non pas du Tchad, auquel il ne sera rattaché qu'en 1930. Sauf à voir la Libye contester aussi la frontière du Niger — c'est peut-être son intention ? On peut, en tout cas, se poser la question — il en résulte que la frontière méridionale de la Libye suit bien, entre Toummo et le tropique du Cancer, la frontière de la Tripolitaine figurant sur la carte acceptée par l'Italie en 1902.

23. En revanche, ce n'est pas le cas à l'est de l'intersection du tropique du Cancer et du 16[e] méridien. L'expansion française n'y est, juridiquement, limitée que par les engagements pris à l'égard de la Grande-Bretagne (pas de l'Italie) en 1899.

Où se trouve cette limite ? Ceci, Monsieur le Président, n'a guère d'importance : même en admettant que cette limite ne résulte pas précisément de la déclaration de 1899, elle a été fixée, sans aucune ambiguïté, par la convention supplémentaire conclue entre la France et la Grande-Bretagne le 8 septembre 1919. Quelle qu'ait pu être la situation auparavant, cette limite — dorénavant frontière puisque la France occupe effectivement la sphère d'influence que l'Angleterre et l'Italie lui avaient reconnue — cette limite donc est constituée par une ligne qui, partant du tropique, prend «une direction sud-est jusqu'au 24[e] degré de longitude est de

Greenwich au point d'intersection dudit degré de longitude avec le parallèle 19° 30' de Greenwich».

Cette frontière s'impose à l'Italie.

Oh ! Certes pas parce qu'elle l'a acceptée : elle ne cessera de protester contre ce tracé entre 1921 et 1935. Mais, ici encore, la Libye assimile un peu facilement des revendications ou des protestations à des droits. La question n'est pas de savoir si l'Italie a protesté : elle a protesté. La question est bien plutôt de savoir si ses protestations étaient légitimes; si ces revendications étaient fondées en droit. Or elles ne l'étaient pas : en 1902, l'Italie avait clairement admis que la France pouvait pousser son expansion coloniale jusqu'à la frontière de la Tripolitaine : le tracé de 1919 est loin d'approcher cette limite à l'est de l'intersection du tropique du Cancer et du 16e méridien est de Greenwich. Aucun motif juridique ne fonde donc les protestations italiennes, et ce d'autant moins qu'à cette date les Français sont effectivement dans la région alors que les Italiens n'y arriveront que bien plus tard : Koufra n'est prise qu'en 1931 et l'Italie obtiendra seulement en 1934 que, par un traité, la Grande-Bretagne renonce à ses prétentions sur le triangle de Sarra.

24. Monsieur le Président, les Parties se sont néanmoins longuement opposées sur le tracé de la limite de la sphère d'influence française résultant de l'accord franco-britannique du 21 mars 1899. La Libye, à mesure que la procédure avançait, a été conduite à mettre l'accent sur la ligne mathématique, qu'elle appelle «strict south-east line», avec d'autant plus de conviction apparente qu'elle semble prendre conscience qu'elle n'a pas de tracé alternatif à défendre, puisqu'elle récuse — à juste titre — celui résultant du traité Laval-Mussolini de 1935, et ne peut évidemment prendre au sérieux le 15e parallèle nord qu'aucun — je dis bien : «aucun» — argument crédible, juridique ou non, ne justifie. Le Tchad, pour sa part, considère que la «ligne sud-est» est convenablement représentée par la carte du *Livre jaune*.

Au demeurant, et compte tenu de ce que je crois avoir établi jusqu'à présent, il me semble que je peux être assez bref sur cette querelle qui a pris une importance démesurée par rapport aux enjeux juridiques réels : puisque l'Italie a admis, par les accords de 1900 et 1902, que la zone d'influence française pouvait s'étendre jusqu'à la frontière de la Tripolitaine figurant sur la carte de 1899, l'Italie ne peut plus protester contre l'emprise coloniale de la France dès lors que celle-ci n'empiète pas sur sa propre sphère d'influence : la Tripolitaine — et le tracé de 1919 respecte entièrement cette condition.

25. Ceci étant rappelé, pourquoi le Tchad soutient-il qu'en tout état de cause, ce tracé ne diffère pas, ou pratiquement pas, de celui de 1899 ? Les raisons sont très nombreuses et elles sont exposées en grand détail dans les écritures tchadiennes (mémoire, p. 185-197 et contre-mémoire, p. 330-344, par. 8.80-8.121). Je me borne à évoquer à nouveau, en quelques minutes, les principales, à la lumière surtout de ce qu'ont répété les avocats de la Libye en plaidoirie.

Commençons par le texte même de l'article 3 de la déclaration si vous le voulez bien, Monsieur le Président. Deux éléments sont à noter. En premier lieu, l'expression «en principe» — «il est entendu en principe ... etc.» Cette rédaction du début de l'article 3 montre que les signataires n'avaient pas le sentiment de résoudre un problème mathématique; simplement la limite de la zone française devant, pour les raisons dont j'ai parlé, être fixée dans cette région presque inconnue, ils écrivent d'emblée qu'il ne s'agit que d'indiquer des directions générales, ce que confirment d'ailleurs les mots : «dans la direction du sud-est».

D'autres arguments ont été avancés par Mac Michael, l'un des principaux négociateurs de la convention du 8 septembre 1919, dans sa lettre à Vansittart du 7 mars 1919. Je me permets de vous y renvoyer, Monsieur le Président, Messieurs de la Cour. Il en conclut : «if the line is drawn *due* south-east it becomes ridiculous» (*mémoire du Tchad*, annexe p. 12). Et de renchérir une semaine plus tard, dans une longue note très motivée sur les nombreuses absurdités («several absurdities») auxquelles conduirait ce qu'il appelait la «ligne littérale» («the litteral line») pour conseiller d'adopter à l'égard des Français une position plus conforme au sens commun (*réplique du Tchad*, annexe 40). La Libye ne semble pas ébranlée par ces sages conseils et se borne, sur certaines des nombreuses cartes qu'elle a préparées, à noter l'existence d'un «gap», dont je ne comprends toujours pas les conclusions juridiques qu'elle en tire (contre-mémoire de la Libye, carte n° 16 ou la carte n° 29 figurant au dossier des juges et CR 93/16, p. 41). Pour sa part, le Tchad y voit une confirmation *a contrario* de l'impossibilité de la ligne mathématique.

26. L'un des traits marquants de la négociation menée entre lord Salisbury et l'ambassadeur Cambon avait été la volonté de la France d'obtenir l'intégralité des hauteurs et des oasis du Tibesti et de l'Ennedi et la partie britannique avait constamment accepté de faire droit à cette demande. Certes, le Tchad ne conteste pas que, comme le rappelle la Libye (CR 93/16, p. 37), les parties se sont fondées non sur les cartes dressées à partir des années dix — qui placent correctement ces montagnes —, mais sur celles datant de la fin du XIX^{e} siècle : la carte de Justus Perthes de 1892, que vous avez ici, ou la carte d'état-major française de 1896. Mais sur l'une comme sur l'autre, il est clair que la ligne mathématique chère à la Partie libyenne, coupe les massifs montagneux — de l'Ennedi surtout — qui y figurent, alors même que ces massifs y sont situés plus au sud, nettement plus au sud, que dans la réalité. Ceci n'est certainement pas conforme à l'intention des parties, d'autant moins qu'à plusieurs reprises la France avait insisté pour qu'une bande de désert lui soit adjugée au pied et au nord de ces montagnes. Le tracé du *Livre jaune* est le seul qui, en se fondant sur les cartes de l'époque, laisse du côté français les oasis et les hauteurs du Tibesti, de l'Ennedi, du Borkou et de l'Ounianga.

27. Sur ce point, la Libye a fait grand cas d'un épisode qui a eu lieu le 19 mars 1899, trois jours avant la signature de la déclaration. Cet épisode est relaté dans une dépêche envoyée par Cambon à Delcassé le soir même (*mémoire de la Libye*, «Annexe : Archives françaises», p. 39-41). Elle commente un projet britannique qui aurait fait partir la ligne qui nous intéresse au *18e parallèle*. Et voici ce qu'écrit Cambon :

> «j'ai fait observer qu'il était impossible de pousser la délimitation jusqu'au 18e parallèle, que ce serait nous enlever une partie notable des territoires que nous revendiquons au nord du Darfour...»

C'est à la suite de cette objection que la rédaction actuelle a été retenue après quelques tâtonnements. L'interprétation de cet épisode, tout à fait important, avancée par la Libye dans son mémoire (p. 176-178, par. 5.35-5.36) et rappelée par M. Sohier au cours de sa plaidoirie du 16 juin (CR 93/16, p. 38-39), est absolument extraordinaire. Se fondant sur l'affirmation selon laquelle le verbe «pousser» s'appliquerait à la délimitation à venir du Darfour (alors qu'il est tout à fait clair que ce verbe concerne la ligne «sud-est»), la Libye en conclut que la France aurait demandé que le point d'arrivée de la ligne soit repoussé vers le sud. Ceci, qui irait à l'encontre de tous les objectifs de négociation poursuivis par la France, ne peut être avancé sérieusement tant il est évident que c'est l'inverse, absolument l'inverse, qui est exact. Ce contre quoi Cambon proteste est la privation de certains territoires du futur B.E.T. qu'entraînerait pour la France le tracé proposé par lord Salisbury; «pousser» cette délimitation vers le sud — comme le voudrait la Libye —, aggraverait à l'évidence cet inconvénient. Et si, en effet, cet épisode est important c'est parce qu'il montre que le point d'arrivée de la ligne se trouve nécessairement *au nord* du 18e parallèle puisque, et sur ce point les parties sont d'accord, lord Salisbury a accepté l'objection de Cambon.

28. Tout, donc, concourt à établir que les parties avaient en tête une ligne certes «sud-est» au sens que les non-cartographes donnent à ce terme, et certainement par une ligne «strictement» sud-est comme l'affirme la Libye. C'est ce que traduit la carte du *Livre jaune*. Regardons-la à nouveau.

Je ne suis ni cartographe ni géographe, Monsieur le Président, et je dois dire que, en conscience, je n'ai jamais éprouvé le moindre doute sur le fait que la ligne en pointillés rouges

que j'ai soulignée, qui descend du tropique du Cancer jusqu'au 24e parallèle, a bien une «direction sud-est». Lord Salisbury et Cambon n'étaient pas non plus cartographes ni géographes et ils auraient sans doute été très surpris si on leur avait dit que cette ligne, qui correspondait à leur intention de laisser tout le B.E.T. dans la zone française, n'était pas sud-est, dans la direction du sud-est. D'autant plus qu'ils avaient pris la précaution de ne prévoir ce tracé que «en principe» et «dans la direction»... On peut d'ailleurs ajouter que la ligne en question n'est pas non plus strictement est-sud-est comme l'affirme aujourd'hui la Libye (CR 93/16, p. 34) : si tel était le cas, elle remonterait encore plus au nord.

29. Le texte de la déclaration, les buts poursuivis par les parties et le simple bon sens donnent donc à penser que la carte du *Livre jaune* traduit fidèlement la pensée des négociateurs. Elle est, depuis le 25 mars, publiée dans le *Livre jaune*. Elle est connue des Britanniques comme le Tchad l'a montré (mémoire du Tchad, p. 161-163) et comme la note de sir Thomas Anderson, alors ambassadeur à Paris, à lord Salisbury le montre. Cette note est du 27 mars; Sanderson y attire l'attention sur le décalage apparent entre le texte et la carte, tout en estimant qu'il n'a guère d'importance («I do not think that it matters much»); Salisbury l'a lue puisqu'il y a apposé son paraphe (mémoire de la Libye, «Annexe : Archives britanniques», p. 37); et pourtant les Britanniques ne réagissent pas. Peut-on imaginer, Monsieur le Président, acquiescement plus net ? La carte du *Livre jaune* n'est pas annexée, formellement, à la déclaration mais c'est tout comme et il n'est pas abusif d'y voir une interprétation authentique de la volonté des parties, que viendra confirmer la convention supplémentaire du 8 septembre 1919.

30. On peut certes soutenir qu'il y a une différence entre le tracé de la carte du *Livre jaune* et celui résultant de la convention de 1919. Le premier, en effet, semble atteindre le 24e méridien approximativement au 19e degré de latitude nord — je dis «approximativement» — car la carte du *Livre jaune*, il faut le rappeler, est au 1/12 000 000e, une échelle qui exclut toute précision. Le second, le texte de 1919, ferait, dans ce cas, si vraiment l'on peut dire que le point d'arrivée est au 19e degré sur la carte du *Livre jaune*, remonter la limite à la hauteur de 19° 30'. Ce sont ces 30', tout de même très approximatives, de différence qui avaient conduit l'ambassadeur de France à Rome, à admettre dans la note

adressée au ministère italien des affaires étrangères le 7 février 1923,

que «cette interprétation, si voisine du tracé provisoire de la carte de 1899, élargit légèrement la zone d'influence française au préjudice du domaine anglo-égyptien» (mémoire du Tchad, annexe 102).

Mais je tiens, Monsieur le Président, à corriger l'impression que mon adroit collègue, M. Cahier, a voulu donner à la Cour il y quinze jours (CR 93/17, p. 18). Cette différence possible entre le tracé de la carte de 1899 et celui résultant de la convention supplémentaire de 1919 serait d'environ et au maximum 22 000 km^2 et en aucun cas de 180 000 km^2 comme M. Cahier l'a laissé entendre. Cette surface, beaucoup plus importante, représenterait le territoire compris entre la frontière de 1919 et la «ligne mathématique» dont nous avons vu qu'elle n'a aucun fondement juridique; et ceci aboutirait à transférer à la Libye, non pas seulement des territoires désertiques, comme l'a dit M. Cahier, mais des oasis comme celles d'Ouri, de Tekro ou d'Ounianga Saghir. Monsieur le Président, ne traçons pas de lignes arbitraires sur les cartes, comme les puissances coloniales l'ont fait en leur temps conformément aux mœurs — et au droit — détestables de l'époque. Nous ne parlons pas de problèmes abstraits et nous ne devons pas perdre de vue que c'est le sort d'hommes et de femmes concrets, en chair et en os, qui est en cause.

31. Au demeurant, quelles que puissent être les différences qui existeraient entre le tracé de 1899 et celui de 1919, il n'en résulterait aucune conséquence quant à la solution du litige soumis à la Cour. Si, en effet, tel était le cas, s'il y avait une différence, ce que je n'admets que pour les besoins de la discussion, c'est en tout état de cause, comme je l'ai dit, la frontière de 1919 qui s'imposerait.

Certes, encore une fois, l'Italie ne l'a pas acceptée. Mais, par les accords de 1900 et de 1902, elle s'était engagée à laisser la France étendre son influence en deçà de la frontière de la Tripolitaine. Du moment que cette condition est remplie — et elle l'est — les protestations de l'Italie sont juridiquement vaines; *pacta sunt servanda.*

L'Italie est même doublement liée. Elle l'est du fait des accords de 1900 et 1902 dont, en 1932 encore, elle admettra qu'ils sont toujours pleinement en vigueur (ceci dans sa note du 1er juillet 1932 que j'ai citée tout à l'heure). Mais l'Italie est également liée en tant qu'héritière de

la Grande-Bretagne à laquelle elle a succédé dans la région à la suite du traité de Rome du 20 juillet 1934, soit près de quinze ans après la conclusion de la convention supplémentaire de 1919.

32. Pour résumer, Monsieur le Président, les conclusions du Tchad sur ce point sont les suivantes :

1) la France s'était vue reconnaître une sphère d'influence dans la région revendiquée par la Libye, ceci par la déclaration franco-britannique du 21 mars 1899;

2) la limite de cette zone d'influence était constituée par une ligne représentée sur la carte du *Livre jaune* partant de l'intersection du tropique du Cancer et atteignant le 24° méridien est de Greenwich à peu près à la hauteur du 19° degré de latitude nord;

3) cette limite a été confirmée par la convention franco-britannique du 8 septembre 1919;

4) par les échanges de lettres de 1900 et de 1902, l'Italie a reconnu à la France le droit d'étendre son influence jusqu'à la frontière de la Tripolitaine figurant sur la carte de 1899;

5) cette ligne constitue la frontière entre la Libye et le Tchad à l'ouest du 16° méridien et jusqu'au point triple avec le Niger;

6) en revanche, à l'est du 16° méridien, la frontière est constituée par la ligne définie par la convention supplémentaire franco-britannique qui constitue l'interprétation authentique de la déclaration de 1899; et l'Italie n'avait aucun droit de protester contre la convention supplémentaire et ses conséquences du fait des accords de 1900 et 1902, plus exactement elle pouvait contester; cette contestation n'était pas fondée.

Bien entendu, pour que ces conclusions soient pleinement exactes, il faut que la situation juridique créée par ces accords n'ait pas été modifiée par la suite. C'est, Monsieur le Président, ce que mon collègue et ami, M. Cassese, montrera, je pense après la pause, si vous voulez bien lui donner la parole à ce moment-là. Monsieur le Président, Messieurs de la Cour, je vous remercie de votre très longue attention.

The PRESIDENT: Thank you very much, Professor Pellet. We will take our break now and then Professor Cassese will take the floor.

L'audience est suspendue de 11 h 20 à 11 h 35.

The PRESIDENT: Please, be seated. Mr. Cassese.

M. CASSESE : Je vous remercie.

1. Monsieur le Président, Messieurs de la Cour, comme c'est la première fois que j'ai l'honneur de plaider devant cette haute juridiction, je suis sûr que vous comprendrez mon émotion et voudrez bien faire preuve d'indulgence à mon égard.

LES TITRES TERRITORIAUX REVENDIQUES PAR LA LIBYE : L'HERITAGE OTTOMAN ET LES CREANCES COLONIALES DE 1915

2. Tout comme mon éminent collègue, M. Alain Pellet, dans ma plaidoirie d'aujourd'hui je vais me placer dans l'optique de la *deuxième thèse* de la République du Tchad : la thèse d'après laquelle, *même* si l'on devait faire abstraction du traité de 1955, les délimitations de 1899 et de 1919 sont pleinement opposables à la Libye.

3. Jusqu'à présent la République du Tchad a montré que la ligne frontière de 1899 était opposable à l'Italie sur la base de l'accord franco-italien de 1902, et qu'elle pouvait par voie de conséquence être invoquée à l'encontre de la Libye, qui a succédé à l'Italie.

Toutefois, cette opposabilité de la ligne frontière de 1899 est contestée par la Libye; elle est contestée par la Libye sur la base de deux arguments :

D'un côté, la Libye invoque ce qu'elle appelle l'«héritage ottoman», à savoir les revendications de la Sublime Porte sur l'*hinterland* de la Tripolitaine, dont auraient hérité tour à tour l'Italie, puis la Libye. De l'autre côté, nos contradicteurs invoquent l'«héritage colonial» : ils prétendent que l'article 13 de l'accord de Londres aurait conféré à l'Italie un droit à des compensations territoriales dont la Libye serait aujourd'hui l'héritière.

Avec votre permission, Monsieur le Président, je voudrais m'attacher à démontrer que ces deux arguments ne résistent pas à un examen attentif.

4. Je commencerai d'abord par le soi-disant «héritage ottoman» de la Libye.

I. L'«HÉRITAGE OTTOMAN»

Monsieur le Président, la Libye invoque cet héritage pour expliquer pourquoi la ligne de 1899 ne lui serait pas opposable. A l'en croire, le traité d'Ouchy (dit également de Lausanne) — vous savez bien, Messieurs les juges, qu'Ouchy fait partie de Lausanne. Il est au bord du lac à Lausanne. Il y a un petit hôtel où on a justement signé le traité dont il est question. Donc, le traité d'Ouchy — ou de Lausanne — et celui de Londres de 1915, auraient sanctionné, d'après la Partie libyenne, la succession de l'Italie à la Turquie, succession sur laquelle l'accord Poincaré-Tittoni de 1912 serait resté sans incidence.

Monsieur le Président, je vous propose de passer en revue rapidement, je vous assure rapidement, ces deux accords internationaux, en commençant par le traité d'Ouchy ou de Lausanne de 1912.

1. Le traité italo-turc d'Ouchy (1912)

5. Monsieur le Président, Messieurs de la Cour, nos éminents collègues de l'autre côté de la barre ont affirmé que «le Tchad a, sans aucun doute, peur du traité d'Ouchy» (CR 93/16, p. 76). Il n'en est rien ! Nous considérons, tout simplement, qu'il n'a aucune pertinence aux fins de la détermination de la frontière méridionale de la Libye. Et cela pour deux raisons principales.

6. La première raison est que le traité d'Ouchy est ambigu, voire contradictoire. Cela s'explique aisément. L'Italie, dans sa boulimie impérialiste, avait voulu faire main basse sur la Libye. Mais elle n'était parvenue qu'à conquérir des zones côtières du pays de la Libye. D'où la nécessité de pactiser avec les autorités ottomanes; bien que le traité lui permît de proclamer sa souveraineté, elle dut faire toute une série de concessions aux Turcs. Cela explique le contenu obscur et compliqué du traité. A ce propos, je vous avoue, Monsieur le Président, que je ne résiste pas à la tentation de citer le commentaire d'un éminent historien italien, Gaetano Salvemini, qui écrivit à l'époque que cet accord :

«rappelle les oléographies qui se trouvent dans certains bistrots de campagne et qui représentent une femme de petite vertu, effrontée, à l'œil souriant et insinuant, laquelle, de quelque point de la salle où vous vous mettez à l'observer, semble toujours vous suivre du regard et ne sourire qu'à vous; et si vous êtes trois à la regarder en même temps de trois angles différents, elle vous sourit et vous flatte tous les trois à la fois ... A qui sourit le traité de Lausanne : à la Turquie ? A l'Italie ? Aux Mahométans de la Libye ? A tous ? A personne ? Nous avons la vague impression, presque instinctive, que le traité de Lausanne est destiné à rester dans l'histoire des relations internationales comme un des leurres diplomatiques les plus raffinés.» (Contre-mémoire du Tchad, annexe 122.)

7. Outre son ambiguïté fondamentale, il y a une deuxième raison pour laquelle ce traité ne revêt aucune importance aux fins de la question des limites spatiales des droits successoraux de l'Italie en Libye : bien qu'il établisse que l'Italie acquiert des droits souverains sur la Libye, *ce traité ne porte aucunement sur les frontières de ce pays.*

Nos honorables contradicteurs glissent sur ce point en faisant valoir qu'en vertu du traité en question, l'Italie «hérite naturellement de tous les titres juridiques précédemment détenus par l'Empire ottoman et pertinents pour la délimitation ultérieure» de la frontière méridionale (CR 93/16, p. 63). Mais cela, Monsieur le Président, suppose que les Turcs aient eu des titres juridiques souverains sur le sud de la Libye.

Or, comme mon collègue M. Shaw va le démontrer tout à l'heure, l'Empire ottoman n'a jamais exercé d'emprise souveraine au sud de la ligne de 1899; il n'a donc *jamais* acquis de titre souverain. Les revendications qu'il avança à ce propos restèrent sans aucune conséquence juridique, car elles ne furent pas accueillies par les autres puissances, et ne purent être établies sur le terrain.

Tout l'«héritage» italien à propos de la frontière méridionale de la Libye se résume à cela : de vagues prétentions coloniales, qui ne furent jamais reconnues par la communauté internationale. On est donc bien loin des soi-disant «droits territoriaux» sur le Borkou-Ennedi-Tibesti (le B.E.T.), dont font état à tout bout de champ nos contradicteurs.

Voilà, Monsieur le Président, pourquoi il est légitime de soutenir que le traité d'Ouchy n'affecta pas le sort de la frontière en question. Certes, l'Italie hérita des droits territoriaux dont disposait auparavant la Sublime Porte. Mais, par la force des choses, l'Italie ne pouvait hériter que des *droits effectivement établis* de la Turquie, ce qui n'était pas le cas pour les

turques sur le B.E.T. Au surplus, comme l'a souligné M. Pellet, l'Italie avait reconnu, par un accord en bonne et due forme, les limites de la Tripolitaine-Cyrénaïque et était donc liée par cette reconnaissance.

2. L'accord franco-italien de 1912 (accord Poincaré-Tittoni)

8. Monsieur le Président, j'en viens maintenant à l'accord Poincaré-Tittoni de 1912.

D'après la Partie libyenne, cet accord est sans incidence sur la délimitation de la frontière méridionale de la Libye. C'est exactement le contraire qui est vrai, comme je vais le montrer.

9. Considérons tout d'abord le *texte* de l'accord, qui se trouve dans votre dossier d'audience au numéro 1.

10. Ce texte est clair :

Les deux parties se proclament *«désireuses d'exécuter ... leurs accords de 1902»*. C'est à cette fin qu'elles s'engagent entre autres à ne pas s'opposer, l'Italie à l'action française au Maroc, et la France aux mesures que les Italiens vont prendre en Libye.

La référence aux accords de 1902 n'est pas fortuite : elle représente bien plus qu'un simple considérant dans un préambule. Elle souligne que le *but essentiel* de l'accord est de confirmer les accords de 1902. Certes, en 1902, le but des arrangements entre les deux pays était simplement de délimiter leurs zones d'influence respectives, car l'Italie n'exerçait encore aucune autorité effective en Libye. En revanche, en 1912, l'Italie avait occupé la Libye et y avait acquis des droits souverains. Dans ce contexte, la référence à l'accord de 1902, contenue dans le traité de 1912, revêt une toute autre signification : à savoir que la France et l'Italie s'engageaient à reconnaître comme *frontière* méridionale de la Libye le tracé figurant sur la carte de 1899, que l'Italie avait reconnue en 1902.

11. Du reste, Monsieur le Président, cette interprétation est confirmée par les *travaux préparatoires* de l'accord.

12. Dans leurs plaidoiries, nos éminents contradicteurs ont insisté sur le fait que l'accord de 1912 ne soufflait mot des questions de frontières. Or, l'étude des travaux préparatoires révèle que cette question était présente dans l'esprit des négociateurs des deux bords. Comme revendications

la République du Tchad s'est longuement attardée là-dessus dans son contre-mémoire (contre-mémoire du Tchad, par. 7.22-7.28), il me suffira de mettre en exergue deux éléments à ce propos.

13. Tout d'abord, les négociations interviennent à un moment où la France *n'avait pas encore reconnu* la situation nouvelle qui découlait du traité d'Ouchy, à savoir l'acquisition par l'Italie de la souveraineté sur la Libye. Elle n'avait pas encore reconnu cela.

La France tint à souligner d'emblée qu'elle n'était pas disposée à reconnaître la souveraineté italienne en Libye «sans préciser [ce sont les mots du président du conseil Poincaré (annexe au contre-mémoire du Tchad, 31, n° 193)] — le territoire auquel elle [la souveraineté italienne] doit s'étendre, et sans sauvegarder nos droits». Vous voyez, Messieurs de la Cour, que l'on était bien loin de la «reconnaissance inconditionnelle» dont ont fait état nos éminents contradicteurs.

Il est vrai que la réserve française concernait seulement la frontière algéro-tripolitaine. Mais la raison pour laquelle Poincaré omit de soulever la question de la frontière méridionale est évidente : la France considérait en effet que la frontière méridionale de la Libye ne prêtait pas à discussion; elle était clairement établie par les accords franco-italiens de 1902; point n'était donc besoin de préciser les droits français en la matière. Voilà pourquoi, Messieurs les juges, le traité n'en souffle mot.

Le deuxième élément à souligner est que ce fut *l'Italie* qui proposa de mentionner explicitement dans l'accord Poincaré-Tittoni les accords de 1902. Le ministre italien des affaires étrangères, San Giuliano, demanda «de faire dériver explicitement l'arrangement à signer des accords de 1902» et cela essentiellement «pour affirmer la continuité et l'efficacité de nos accords» (contre-mémoire du Tchad, annexe 36, n° 241).

14. Quelle conclusion peut-on donc tirer du texte de l'accord de 1912 et des travaux préparatoires ? La conclusion est simple et univoque : quelques jours après le traité d'Ouchy, les Italiens réaffirmèrent, par un accord avec la France, qu'ils restaient liés par les dispositions de l'accord franco-italien de 1902. Par voie de conséquence, l'Italie, désormais souveraine en Libye, s'engageait à considérer la carte de 1899 comme déterminant la frontière méridionale de

la Libye. De ce fait, l'Italie renonça à d'éventuels droits successoraux à la Turquie au sud des confins méridionaux de la Libye. En d'autres termes, cet engagement de 1912 créait une véritable *forclusion* pour l'Italie. Loin de s'opposer à l'accord de 1902, l'Italie en réaffirmait la validité à un moment où la Tripolitaine-Cyrénaïque n'était plus — au moins en partie — pour l'Italie, une zone d'influence, mais une véritable colonie.

3. Le traité de Londres de 1915

15. Monsieur le Président, j'en viens maintenant au traité de Londres de 1915, dans lequel la Libye a voulu voir une confirmation de sa thèse sur l'héritage ottoman. La Libye invoque notamment l'article 10, que vous trouvez dans votre dossier d'audience, au numéro 2, et que vous pouvez aussi voir sur l'écran.

Il est vrai que, en vertu de cet article 10, l'Italie a obtenu des puissances contractantes de l'accord de Londres que l'on mette fin aux droits et privilèges qu'elle [l'Italie] avait dû concéder à la Turquie lors de la conclusion du traité d'Ouchy de 1912, qui marque la fin de la souveraineté ottomane en Libye.

16. Mais de quels droits s'agissait-il ?

Nos collègues libyens l'ont rappelé dans la fresque historique qu'ils ont magistralement brossée. Les droits et privilèges que le sultan avait gardés en 1912 avaient trait *et* à la protection des intérêts ottomans en Tripolitaine et en Cyrénaïque *et* au maintien des prérogatives du sultan en matière religieuse.

En toute hypothèse, les droits en question étaient dépourvus de tout caractère territorial : l'Italie, qui était en position de force, avait nettement refusé toute concession qui aurait pu entraver l'annexion de la Libye.

Ainsi, tout ce que l'Italie obtint à l'occasion du traité de Londres de 1915, c'est que l'on s'engage à mettre un terme à cet ultime résidu de l'ancienne souveraineté ottomane. Ce qui fut fait, par le traité de paix de Lausanne, de 1923.

17. Monsieur le Président, le simple rappel des dispositions pertinentes et de leur contexte suffit à montrer que ni le traité de Londres, ni le traité de paix de 1923 n'envisageaient

conservés par le sultan en 1912, auquel ces deux traités font renvoi — rien de plus. Il serait donc abusif de voir dans ces dispositions une «reconnaissance tous azimuts» de la succession de l'Italie aux droits de la Turquie.

18. Que les choses soient claires, Monsieur le Président. Je ne parle pas ici de la succession d'Etats *en général* : personne ne conteste que l'Italie succéda à la Turquie en Libye. Ce que nous contestons, en revanche, c'est l'idée selon laquelle l'Italie aurait hérité des droits éventuels de la Turquie sur les territoires au sud de la ligne de 1899. A cet égard, en effet, l'Italie ne pouvait succéder à la Turquie, car elle avait renoncé à toute prétention de ce genre lors des accords de 1902 et de 1912 avec la France.

4. La pratique subséquente de l'Italie

19. La pratique subséquente de l'Italie devait du reste confirmer que l'Italie ne se sentait pas en mesure de revendiquer un héritage de ce genre.

En parcourant les nombreuses notes diplomatiques italiennes, on s'aperçoit que même quand Rome protesta, entre 1921 et 1934, contre l'occupation effective, par la France, du B.E.T., les autorités italiennes alléguèrent une prétendue violation, par la France, de ses engagements *conventionnels* avec l'Italie.

En clair, l'Italie soutenait que la France violait la convention franco-anglaise de 1899, reconnue par l'Italie en 1902 et en 1912. En revanche, elle — l'Italie — n'invoqua à aucun moment d'éventuels droits de succession à l'Empire ottoman.

20. Je rappellerai aussi la déclaration que le ministre italien des affaires étrangères, M. Tittoni, fit à la Chambre des députés le 27 septembre 1919, donc bien après la conquête italienne de la Libye. Dans cette déclaration, Tittoni rappelle que :

> «déjà dans l'accord Prinetti-Barrère du 1er novembre 1902 *nous avions reconnu* la frontière de la convention franco-anglaise du 15 (sic) juin 1898 (sic), qui avait assigné à la France le Tibesti et le Borkou» (mémoire du Tchad, annexe 337; les italiques sont de nous).

J'ouvre une parenthèse : Tittoni, évidemment, se méprend sur la date, car il aurait dû citer la convention de 1899; il s'agit sans aucun doute d'un *lapsus linguae*. Je ferme la parenthèse et je vous prie, Monsieur le Président, Messieurs les juges, de noter les termes de cette déclaration de succession de l'Italie à la Turquie. L'un et l'autre se bornaient à prévoir l'abolition des privilèges

du ministre des affaires étrangères italien, M. Tittoni : «*nous avions reconnu*», il évoque «*la frontière*» de 1898; notez encore qu'il ne fait pas état d'éventuels *droits successoraux* de l'Italie à l'Empire ottoman. Cette prise de position publique, émanant de l'organe italien principal des relations internationales, a une importance capitale, que personne ne peut nier.

21. Mais nos honorables contradicteurs ont tâché de tirer profit d'une note de 1929 dans laquelle l'ambassadeur français à Rome, Beaumarchais, relate un entretien avec Mussolini (CR 93/18, p. 25).

Au cours de cet entretien, Mussolini avança une série de revendications, allant même jusqu'à évoquer la vieille théorie de l'héritage ottoman que, disait-il, ses bureaux le pressaient d'exhumer. Mais le ton de l'entretien montre bien, Monsieur le Président, qu'il ne s'agissait que d'un ballon d'essai parmi tant d'autres.

Et en tout cas l'ambassadeur français rejeta avec fermeté la tentative de Mussolini, lui rappelant que la situation était définitivement réglée par les accords de 1899 et 1902 (réplique de la Libye, vol. II, pièce 5.4, p. 336).

22. Par la suite, le Italiens s'en sont tenus à une thèse moins tortueuse que celle de Mussolini. La République du Tchad a amplement illustré ce point dans ses écritures. Elle a notamment montré comment, en dépit des velléités belliqueuses du ministère des colonies, le point de vue du ministère des affaires étrangères, à juste titre plus soucieux du contexte juridique, avait toujours fini par prévaloir (voir réplique du Tchad, par. 7.37-7.60). Mais, Monsieur le Président, je me contenterai de mentionner deux déclarations à titre d'exemple.

23. La première émane du chef du département pour l'Afrique du ministère des affaires étrangères, M. Guariglia. Dans une note adressée en 1930 à l'ambassadeur italien à Paris, ce grand expert des problèmes africains indiquait son désaccord avec l'interprétation du ministère italien des colonies dans les termes suivants :

> «il n'est pas approprié de se référer aux souvenirs historiques des garnisons ottomanes établies au Tibesti, puisque ces argumentations nous sont *interdites* par l'échange de notes Prinetti-Barrère» (mémoire du Tchad, annexe 117; les italiques sont de nous).

L'ambassadeur à Paris surenchérit dans sa réponse :

«Il faut s'en tenir aux actes de 1902 et à l'article 13 du Pacte de Londres, tout en donnant aux uns et à l'autre l'application la plus favorable à notre thèse [...]. Je déconseille vivement d'abandonner ces *indiscutables bases juridiques* [...] vouloir agir d'une manière différente et contester la souveraineté française au sud de notre ligne de 1899 serait à mon avis agir *sans fondement juridique* et en désaccord avec nos actes précédents.» (Contre-mémoire du Tchad, annexe 64; les italiques sont de nous.)

24. Notez-le bien, Messieurs les Membres de la Cour : cette thèse dépourvue de tout fondement juridique dont parle l'ambassadeur italien, c'est la fameuse thèse de l'héritage ottoman, la thèse que la Libye s'efforce aujourd'hui de ressusciter !

25. Certes, il est arrivé à l'Italie de revendiquer cet héritage, mais contre la Grande-Bretagne. La Libye l'a rappelé devant vous, en invoquant les négociations italo-britanniques relatives à ce que l'on a appelé le «triangle de Sarra» (CR 93/18, p. 25). Mais ceci ne fait que confirmer ce que j'avance : la région de Sarra se trouve en effet en dehors de la sphère française et l'Italie n'était pas liée à l'égard de la Grande-Bretagne. Si bien que, de toute manière, l'invocation de l'héritage ottoman était superflue. Au surplus, la dévolution du triangle de Sarra à l'Italie ne s'est pas faite par voie d'héritage, mais par traité : c'est le traité de 1934.

II. L'HERITAGE COLONIAL : LE «DROIT» AUX COMPENSATIONS TERRITORIALES

26. Monsieur le Président, j'en arrive au deuxième volet de ma plaidoirie, à savoir les droits que la Libye prétend encore tirer du traité de Londres de 1915. Là encore il s'agirait d'un héritage, mais cette fois-ci d'un autre genre, puisque ce que la Libye revendique, c'est l'*héritage colonial italien*.

27. Nos éminents contradicteurs ont monté en épingle l'article 13 du traité de Londres de 1915, dont ils ont fait une des pièces maîtresses de leur argumentation. A cet égard, on ne peut qu'être frappé par le parallèle entre la Libye d'aujourd'hui et l'Italie colonialiste.

Tout comme l'Italie de Mussolini l'a fait pendant plus de dix ans, les Libyens axent aujourd'hui l'essentiel de leurs revendications sur l'article 13. Or, cette disposition n'est pas sans évoquer le fameux Acte Général de la conférence de Berlin de 1885 sur le partage de l'Afrique entre

puissances européennes. Au fond, que fait l'article 13, sinon envisager, tout comme l'Acte Général de Berlin, un découpage de territoires africains — cette fois-ci en faveur d'une puissance impérialiste, l'Italie, et aux dépens d'autres puissances impérialistes ?

L'ironie de l'histoire veut qu'un pays comme la Libye, qui s'érige en champion de l'anti-colonialisme, en soit réduit à tout miser sur une disposition qui représente l'archétype d'un colonialisme heureusement révolu.

28. Mais voyons de plus près les arguments spécifiques que la Libye tire de cette disposition de 1915.

Cette disposition, que vous trouvez dans votre dossier de séance au n° 2 et qui est aussi sur l'écran, je vais l'illustrer comme suit.

29. La thèse libyenne s'articule autour des trois points suivants :

i) en premier lieu, l'article 13 prévoyait deux types de compensation en faveur de l'Italie : des cessions de territoire et la détermination favorable de frontières contestées;

ii) en deuxième lieu, toujours selon la Libye, ces deux aspects étaient présents dans l'accord Laval-Mussolini de 1935, qui prévoyait une cession de territoire en faveur de l'Erythrée italienne et la détermination de la frontière contestée au sud de la Libye;

iii) en troisième lieu, comme l'accord Laval-Mussolini n'entra jamais en vigueur, les droits que l'Italie tirait de l'article 13 passèrent à la Libye, et cela à l'occasion de son indépendance, en dépit du fait que l'Italie avait renoncé en 1947 à tous ses droits sur ses colonies africaines. En effet, toujours selon la Libye, le droit visé à l'article 13 appartiendrait à cette catégorie de droits territoriaux qui, en vertu de la convention de Vienne sur la succession d'Etats en matière de traités, passent toujours à l'Etat successeur.

30. Monsieur le Président, Messieurs les juges, ce raisonnement de la Libye a — vu de très loin — l'apparence de la logique. Toutefois, en y regardant de près, on s'aperçoit que chacune de ses trois branches est erronée.

31. Mais avant d'examiner ces trois branches de l'argumentation libyenne, permettez-moi, Monsieur le Président, d'appeler votre attention sur un fait important : la thèse de *l'héritage colonial*, basée sur l'article 13 de l'accord de Londres, est en contradiction avec la

thèse de *l'héritage ottoman*. Pourquoi ? Parce que, en basant leurs principales revendications sur les «compensations équitables» prévues par le traité de Londres, l'Italie d'abord et la Libye ensuite ont reconnu implicitement qu'elles étaient *dépourvues de tout titre juridique spécifique* sur le B.E.T. En effet, Monsieur le Président, on voit mal pourquoi elles auraient prétendu obtenir des compensations dans cette région si elles détenaient déjà un *titre spécifique*.

32. Revenons au traité de Londres et commençons par l'interprétation de son article 13.

La Libye a affirmé à plusieurs reprises (voir par exemple CR 93/17, p. 81-82) que l'article 13 «prescrit une obligation pesant sur la France à l'avantage de l'Italie». C'est là une affirmation qui *déforme complètement* la porté de cette disposition.

Lisons-la ensemble et jugez-en, Messieurs les juges. Cette disposition à l'article 13 conférait-elle à l'Italie le *droit d'exiger* des agrandissements territoriaux en Afrique ? Imposait-elle, du même coup, une *obligation* à la France et à la Grande-Bretagne de donner des territoires à l'Italie ? Précisait-elle les territoires par rapport auxquels l'Italie aurait pu demander ces agrandissements ? Rien de tout cela, Monsieur le Président.

Cette disposition de l'article 13, d'un flou déconcertant, se borne à prévoir que les deux puissances «reconnaissent *en principe* que l'Italie *pourrait* réclamer quelques compensations équitables».

L'Italie n'acquérait donc pas un véritable *droit*, si ce n'est celui d'avancer à l'avenir des prétentions, sans que soient précisées les obligations corrélatives de la France et de la Grande-Bretagne. Vous voyez bien que tout est laissé dans un flou savant. En d'autres termes l'article 13, loin d'établir des droits et obligations définis, se limite à énoncer un engagement à la portée incertaine et à caractère *essentiellement politique* des deux puissances en faveur de l'Italie. J'ajouterai, Monsieur le Président, que le caractère contraignant de l'article 13 est tellement faible que l'on hésiterait même à le définir, cet article 13, comme un *pactum de contrahendo*, c'est-à-dire comme une obligation juridique de conclure un accord futur.

A ce propos, permettez-moi de rappeler que bien différente était la teneur de la proposition d'article soumise par l'Italie lors des négociations à Londres : l'Italie proposait de spécifier que «*on procédera à un accord spécial* pour *assurer* à l'Italie quelques compensations

équitables» (réplique du Tchad, annexe 30). Donc, on procédera à un *accord spécial* pour *assurer* à l'Italie des compensations équitables. Vous voyez bien la différence entre la proposition italienne et le texte adopté. L'article 13, dans son libellé final, n'imposait ni la négociation, ni — à plus forte raison — la conclusion d'un accord futur. Tout au plus contenait-il une très vague promesse de la France et de la Grande-Bretagne : après la guerre, ces pays traiteraient avec *bienveillance* toute demande territoriale italienne en Afrique.

33. Au demeurant, les faits vont se charger de confirmer le caractère très vague de l'article 13.

Sur la base de cette disposition de l'article 13, l'Italie revendiquera *tantôt* la seule bande d'Aouzou — au moment du traité Laval-Mussolini, par exemple —, *tantôt* l'intégralité du territoire tchadien et des portions importantes du Niger, de la Nigéria et du Cameroun — et cela dans le fameux «programme maximal». C'est dire combien l'imprécision de l'article 13 était grande.

34. Vous vous demandez peut-être, Monsieur le Président, le pourquoi de ce flou savant. Il y a tout lieu de penser qu'il était délibéré. La France et l'Angleterre n'entendaient pas se lier les mains d'une manière trop précise. Et cela résulte notamment du rejet d'un projet dans lequel l'Italie énumérait les zones sur lesquelles devaient porter les compensations. La France, qui avait de fortes appréhensions au sujet des visées italiennes sur Djibouti, se refusa à aller au-delà d'une simple *promesse* à caractère politique. Tous ces points sont amplement exposés dans la réplique tchadienne (réplique du Tchad, par. 3.05-3.14) donc, je ne m'y attarde pas.

35. En revanche, il me paraît utile d'appeler l'attention de la Cour sur les contrastes saisissants qui existent entre l'article 13 et d'autres dispositions de l'accord de Londres, dont les termes sont dépourvus de toute ambiguïté. L'article 4, par exemple — vous le trouverez dans votre dossier de séance, Messieurs les juges —, prévoyait que «Dans le traité de paix, l'Italie obtiendra le Trentin, le Tyrol cisalpin avec sa frontière géographique et naturelle (la frontière du Brenner)», et suivent d'autres indications précises, que je vous épargne, Messieurs les juges. Pour sa part, l'article 5 du même traité prévoyait — là encore c'est une disposition que vous trouvez dans votre dossier de séance — que «L'Italie recevra également la province

de Dalmatie dans ses limites administratives actuelles, en y comprenant au nord Lisarica et Tribania, et au sud jusqu'à une ligne partant sur la côte du Cap Planka», et suivent d'autres indications.

J'arrête là l'énumération des règles du traité de Londres, tant le contraste avec l'article 13 du même traité est évident. D'un côté, vous avez des dispositions qui spécifient d'une manière très détaillée les confins des contrées à transférer à l'Italie après la guerre, d'un autre côté, vous avez l'article 13 dont l'indétermination ne pourrait être plus frappante. D'un côté, la lumière de la précision cartésienne, de l'autre la pénombre des vagues engagements politiques.

36. J'en viens, Monsieur le Président, à mon deuxième argument. Contrairement à ce que prétendent nos éminents contradicteurs, l'article 13 n'envisageait que des cessions territoriales. Cela ressort clairement du texte même de la disposition et des travaux préparatoires et de la pratique subséquente des parties. Monsieur le Président, je vous propose de passer ces trois points en revue : texte, travaux préparatoires et pratique subséquente.

37. Le texte de l'article 13, tout d'abord. La Libye s'évertue à voir dans les «compensations équitables» que l'Italie pouvait réclamer, une référence implicite à d'éventuelles délimitations de frontière. Or la lecture de cette disposition montre bien qu'elle envisageait exclusivement des cessions de territoires en faveur de l'Italie, et cela dans les zones situées à la frontière entre les colonies italiennes et celles de ses alliés du moment, la France et la Grande-Bretagne.

38. Pourquoi s'obstiner, devant un libellé aussi clair, à parler d'une simple «délimitation» de frontière ? Une telle interprétation est dépourvue de toute vraisemblance historique. Le traité de Londres — il n'est pas inutile de le rappeler ici — énumérait les conditions auxquelles l'Italie entendait monnayer son entrée en guerre aux côtés des alliés. Comment croire que le Gouvernement italien, pour prix de sa participation à une des guerres les plus sanglantes de son histoire, n'aurait exigé qu'une simple «délimitation» de la frontière dans une zone désertique ? Peut-on vraiment croire que le Gouvernement italien, qui faisait miroiter à une

opinion publique réticente les immenses bénéfices coloniaux que sa décision allait lui valoir, se serait contenté d'aussi peu ? Cette hypothèse est tout simplement déroutante.

39. En vérité — les travaux préparatoires du traité le montrent bien — l'Italie était beaucoup plus ambitieuse. Les documents soumis par la République du Tchad ont fait état du véritable *catalogue de revendications* que le Gouvernement italien entendait soumettre à ses partenaires. On y trouve pêle-mêle le prolongement des droits italiens sur la Tunisie, des cessions de territoires à l'est, à l'ouest et au sud de la Tripolitaine, ainsi qu'en Somalie, etc.

On y trouve aussi, à propos des régions qui nous intéressent, cette référence que je ne résiste pas à la tentation de citer, tant elle est éloquente :

> «nous pourrions demander l'ensemble ou en partie le Tibesti et le Borkou qui, *en d'autres temps*, étaient considérés comme appartenant à la Tripolitaine» (télégramme de l'ambassadeur italien à Paris, Tittoni, au ministre des affaires étrangères, 23 mars 1915; réplique du Tchad, annexe 31; les italiques sont de nous).

Passage éloquent s'il en est, qui confirme à la fois que l'Italie se plaçait uniquement, et on la comprend, dans l'optique de *cessions* de territoires et qu'elle était consciente de ce que, au moment où se déroulaient les négociations — en 1915, notez-le bien — le Borkou et le Tibesti étaient sous souveraineté française.

40. Enfin — et c'est là ma troisième remarque — la *pratique ultérieure*, la pratique subséquente des parties, devait confirmer que les ambitions territoriales italiennes ne se limitaient pas à une simple «délimitation» de frontières. Au cours des négociations de paix qui eurent lieu à Paris en 1919, la France, en application de l'article 13 de l'accord de Londres, proposa de céder une partie du Tibesti à l'Italie.

Cette dernière (l'Italie) *repoussa* la proposition française, réclamant «les territoires sahariens du Tibesti, du Borkou et de l'Ennedi, tous [sic] entiers, dans leurs délimitations géographiques et ethniques» (mémoire du Tchad, annexe 92). Dans son rapport sur les négociations, le conseil suprême des Alliés devait indiquer que la France et l'Italie n'avaient pu s'accorder sur «une rectification de la frontière ... méridionale de la Libye» (mémoire du Tchad, annexe 89). Monsieur le Président, parler de «rectification» d'une frontière n'a évidemment de sens que si l'on part du principe qu'une telle frontière existe bien. On voit ai

que, dans l'esprit de *toutes* les parties en cause, l'article 13 n'envisageait que des cessions de territoires. La souveraineté française sur le B.E.T. étant admise par tous les intéressés, toute la question était de savoir de quelle ampleur seraient les compensations équitables auxquelles avait droit l'Italie.

En revanche, un compromis put être trouvé en ce qui concerne la rectification de la frontière entre la Libye et l'Algérie. L'accord franco-italien du 12 septembre 1919, conclu en application de l'article 13 de l'accord de Londres, attribuait à l'Italie une partie du territoire soumis à la souveraineté française. Une fois encore, Monsieur le Président, on se plaçait donc dans l'optique *exclusive* de cessions de territoires, tout en envisageant la conclusion d'accords ultérieurs, mais toujours dans la même optique.

41. Telle fut du reste l'interprétation italienne de cet accord franco-italien de 1919. S'adressant à la Chambre des députés quelques jours après la conclusion de l'accord, le ministre des affaires étrangères, Tittoni, toujours Tittoni, fit valoir qu'il s'agissait d'une «*cession* utile à coup sûr, mais en somme bien peu de chose», ajoutant dans la foulée que «la question du Tibesti et du Borkou, ou d'une autre compensation au lieu de ces régions, reste ouverte et sera l'objet de négociations ultérieures» (mémoire du Tchad, annexe 337; les italiques sont de nous).

Vous savez bien, Messieurs les Membres de la Cour, ce qu'il en advint. Invoquant l'article 13, l'Italie ira jusqu'à revendiquer le Tchad tout entier dans son «programme maximal» de 1928 — on était décidément bien loin d'une simple délimitation de la frontière ! — et elle finit par se contenter, en 1935, de la *cession* d'une partie relativement réduite du territoire français, à savoir ce qu'il est devenu courant d'appeler la «bande d'Aouzou».

42. Monsieur le Président, les «droits» de l'Italie en vertu de l'article 13 ainsi précisés, il convient de se poser la question de savoir si la Libye en a hérité.

Il est admis par la Libye que par l'article 23 du traité de paix de 1947, l'Italie renonça à tous ses droits, titres et revendications concernant ses anciennes colonies africaines.

On peut discuter de l'effet de cette disposition : opérait-elle un transfert de souveraineté au profit des quatre grandes puissances, ou laissait-elle en suspens la question de la souveraineté sur la Libye ? Point n'est besoin de trancher la question : il est indiscutable que l'article 23 mit fin à la souveraineté italienne.

Dès lors, qu'advint-il entre 1947 et 1951 — date de l'indépendance de la Libye — des revendications territoriales découlant pour l'Italie de l'article 13 du traité de Londres ?

43. La réponse est claire : ces revendications prirent fin, et ce, pour une raison toute simple : il s'agissait de revendications coloniales à caractère *politique*, revendications qui perdaient toute raison d'être avec la fin du colonialisme italien en Afrique.

44. Mais la Libye refuse de se rendre à l'évidence; la Libye invoque obstinément l'article 11 de la convention de Vienne sur la succession d'Etats en matière de traités — qui consacre, nous le savons bien, le droit international coutumier en cette matière. Nos éminents contradicteurs affirment qu'en vertu de cet article 11, qui établit qu'il y a toujours succession en matière de régime territorial, la Libye a hérité de la créance politique que l'Italie tirait de l'accord de Londres. Monsieur le Président, cette thèse me paraît insoutenable, et ce pour deux raisons.

45. En premier lieu, la succession d'Etats n'implique évidemment que le transfert des droits et titres territoriaux qui *existaient et étaient valables* au moment de la succession. Or, les prétentions dérivant de l'article 13 prirent fin en 1947, comme je l'ai dit tout à l'heure. En effet les parties au traité de paix de 1947 comprenaient les quatre parties à l'accord de Londres — qui étaient la France, la Grande-Bretagne, la Russie et l'Italie. Donc, le traité de 1947, *lex posterior*, supplante l'accord de Londres. Loin de donner suite aux prétentions découlant de l'article 13, en 1947 les parties tombèrent d'accord sur la renonciation définitive par l'Italie à ces prétentions.

L'article 13 de l'accord de Londres fut donc abrogé *inter partes*.

Cela, Monsieur le Président, est confirmé par l'article 2 de l'annexe 11 du traité de paix, qui dispose que :

> «les quatre puissances (Etats-Unis, France, Royaume-Uni, Union Soviétique) régleront le sort définitif des territoires en question (les colonies italiennes en Afrique) et procéderont aux ajustements de leurs frontières».

Cette disposition présuppose évidemment l'extinction totale des droits, titres et prétentions italiens en Afrique. Du même coup, elle confie aux quatre puissances le droit non seulement d'établir le sort des territoires coloniaux italiens, mais encore de procéder à d'éventuelles *rectifications de frontières*. Il est évident, Monsieur le Président, que l'Italie sortait de scène et tous ses droits s'éteignaient.

46. J'en viens, Monsieur le Président, à la deuxième raison pour laquelle les prétentions découlant de l'article 13 de l'accord de Londres ne passèrent pas à la Libye.

Même si, par impossible, on voulait admettre que ces revendications italiennes avaient été mystérieusement ressuscitées en 1951, elles n'auraient en toute hypothèse pas pu passer à la Libye, car il ne s'agissait pas de droits *territoriaux* au sens de l'article 11 de la convention de Vienne sur la succession d'Etats.

En effet, cet article dispose, vous le savez bien, que la succession d'Etats ne porte pas atteinte : *primo*, aux traités «établissant une frontière», *secundo*, aux «obligations et droits établis par un traité et se rapportant à un régime de frontières».

47. A en croire la Libye, les droits dérivant de l'article 13 rentreraient dans cette seconde catégorie. Cette interprétation, Monsieur le Président, témoigne d'une méconnaissance de l'esprit et de la lettre de la convention de Vienne.

48. L'interprétation la plus approfondie de l'article 11 de la convention de Vienne a été donnée dans un article écrit pour l'*Annuaire français de droit international* par M. Yasseen, qui avait présidé, vous le savez, aussi bien la Commission du droit international lors de la rédaction du projet de convention, que le comité de rédaction de la conférence diplomatique qui adopta la convention. L'interprétation de M. Yasseen fait donc autorité.

Que signifie l'expression «régime des frontières» au sens de l'article 11 ? — s'interroge M. Yasseen. Et voici sa réponse :

> «Le sens de l'expression 'régime des frontières' peut prêter à controverse, mais il est possible de dire qu'il renferme les droits et obligations relatifs à la frontière qui sont attachés au territoire et dont la disparition lors d'une succession d'Etats modifierait sensiblement le règlement de frontière, tels un droit de pacage, un droit de passage ou un droit de transit.» (*AFDI*, 1978, p. 86.)

Par analogie avec le droit civil, M. Yasseen parle à ce propos de «droits réels» (*ibid.*, p. 82). Et surtout il ajoute :

> «Ne font certes pas partie du régime de frontières et ne sont donc pas transmissibles les obligations et les droits de caractère *politique* ou qualifiés de *personnels*, dont le lien avec le territoire n'est pas suffisamment étroit.» (*Ibid.*, p. 86; les italiques sont de nous.)

49. Or, Monsieur le Président, c'est précisément ce dont il s'agit en l'espèce : je pense

avoir amplement démontré que l'article 13 de l'accord de Londres se bornait à établir un vague engagement politique en matière d'ajustements territoriaux, sans préciser ni les *territoires* visés, ni les *critères* qui seraient retenus pour effectuer ces ajustements. Le droit que l'Italie tirait de l'article 13 n'était pas seulement *général*; il était encore indéterminé, en ce sens qu'il ne portait pas *spécifiquement* sur une zone précise, mais sur l'*ensemble* des frontières des colonies italiennes en Afrique. Parler de «régime de frontières» à ce propos est donc tout à fait abusif.

Dès lors, comment prétendre que cet engagement politique puisse être passé à la Libye ?

III. CONCLUSION

50. J'en arrive ainsi à ma conclusion, Monsieur le Président.

Monsieur le Président, la stratégie de nos éminents contradicteurs consiste à essayer d'enfermer la Cour dans une *alternative simpliste* : soit la Libye a succédé à l'Italie, et dans ce cas elle a hérité de tous les droits que détenait cette dernière, y compris en vertu de l'article 13; soit la Libye n'est à aucun égard le successeur de l'Italie, et n'est dès lors pas liée par les obligations découlant, pour l'Italie, des conventions concernant la frontière méridionale de la Libye (voir CR 93/20, p. 55). Autrement dit, et pour reprendre les propos de nos éminents collègues de l'autre côté de la barre (voir CR 93/20, p. 51), ou bien la Libye a succédé à l'Italie, et dans ce cas elle a reçu *et* l'actif *et* le passif de cet héritage, ou bien elle n'a pas succédé du tout. Dans ce dernier cas, on ne saurait lui imposer seulement le passif.

Malheureusement pour nos contradicteurs, la réalité ne se prête pas toujours à ce genre de raisonnement «tout ou rien». Certes, la Libye a succédé à l'Italie — nul ne le conteste. Mais elle n'a hérité que des droits et obligations à caractère *territorial*, conformément à la convention de Vienne que je viens d'évoquer. En revanche, la Libye n'a pu hériter de droits éminemment *politiques*, comme les créances coloniales — fort éventuelles et conditionnelles — que l'Italie tirait de l'article 13 : ces droits, nous l'avons vu, ont pris fin avec le traité de paix de 1947.

Il en va de même de ce que la Partie libyenne a appelé l'«héritage ottoman». M. Shaw vous indiquera tout à l'heure que cet héritage se réduisait à un ensemble de *revendications*, je dis bien *revendications*, je ne dis pas *droits*, qui ne pouvaient être transmises à l'Etat

successeur. Qui plus est, l'Italie s'était engagée en 1902, à l'égard de la France, à accepter la présence de celle-ci au-delà des frontières de la Tripolitaine-Cyrénaïque. Elle ne pouvait remettre cet engagement en cause.

Par conséquent, Monsieur le Président, Messieurs de la Cour, ni l'Italie, ni par la suite la Libye, n'ont pu opposer de titre aux droits incontestables que la France tirait des délimitations de 1899 et 1919 et de son occupation effective des territoires ainsi délimités.

Monsieur le Président, Messieurs de la Cour, je vous remercie pour votre patience et je vous prie, Monsieur le Président, de bien vouloir appeler à la barre M. Malcolm Shaw.

Mr. PRESIDENT: Thank you very much, Professor Cassese. Mr. Shaw.

Mr. SHAW:

The non-relevance of original title

1. Mr. President, Members of the Court, I am honoured and delighted to be appearing before you for the first time.

2. As my colleagues have explained, Chad's title to the B.E.T. is clearly established under the 1955 Treaty, which provided an agreed mechanism for the identification of the border in question. This mechanism accepted by France, the predecessor State to Chad, and Libya itself, operated by enunciating a specific list of instruments deemed determinative of the boundary line.

3. My task, however, is to assist the Court to understand the situation as it existed prior to the establishment of French title and thus to appreciate the true nature of Libya's claims. Professor Higgins will deal with the legal preconditions for the acquisition of title by France. Professor Cassese will show the achievement of that title and has analysed the alleged succession by Italy, and then Libya, to the claims asserted with regard to the Ottoman Empire. Whatever rights may have existed over the territory at issue in the early years of this century were clearly extinguished upon the permanent assumption of control by France in 1913-1914. Nevertheless, it is pertinent for us to consider the situation in the years prior to that occupation in order to bring to the Court's attention the con fusing nature of Libyan allegations, upon

which so much appears now to be founded, for as Professor Dolzer informs us "at the heart of the Libyan case lies the fact that the Ottoman Empire and the Senoussi peoples held title to the borderlands in 1912" (CR 93/20, p. 19).

4. I wish to make the following submissions. First, that the Ottoman Empire never had title to the B.E.T., neither on the basis of exercise of effective control nor on any other basis. Second, that the Senoussi Order was never more than an intermittent source of religious influence, and to some extent political influence, ranging across northern and central Africa. This influence while strong in Tripolitania and Cyrenaica was weak in the B.E.T. Third, that the failure of the Ottomans and the Senoussi Order to establish an independent source of title is not retrieved by seeking to combine the two into some form of claimed joint sovereignty. Fourth, that the indigenous peoples, whose nature has been misrepresented by the Libyans, were the bearers of rights over the territory but were insufficiently organized to possess territorial sovereignty under international law.

Libyan claims

5. Libya arguments may be summarized as follows. Between 1890 and 1912, the territory to the south of Tripolitania, particularly the B.E.T., was not *terra nullius*, but was rather held in a form of "shared sovereignty" by the Ottoman Empire, the Senoussi Order and the indigenous inhabitants. The implication of this is that when the French arrived, original title lay elsewhere and could only have been acquired as a result of conquest, prohibited under post-1919 international law. It is argued that somehow this asserted original title continued to subsist until Libya's assimilation of it by way of succession. It is claimed Libya inherited all the titles of the Ottoman Empire via Italy together with those of the Senoussi Order and the indigenous peoples.

6. However, Libya demonstrates no little confusion in its analysis in its written pleadings of this asserted concept of "shared sovereignty". It is maintained, on the one hand, that the indigenous peoples possessed an existing legal title based on their long-established presence and effective administration (ML, para. 6.39), while on the other, it is declared that the sovereignty transferred by the Ottoman Empire embraced "the territory and peoples of Tibesti, Borkou,

Ouninga, Erdi and Ennedi"(*ibid.*, para. 4.188). It is then proposed that the territory and peoples in question were "under the joint control and shared authority of the Senoussi and the Ottoman Empire" *(ibid.)*.

7. Quite what we are to make of this division between sovereignty and joint control and shared authority is never clarified, but it is termed "mutual accommodation" (*ibid.*, para 6.28) or "a community of title" (the Submissions following paragraph 6.7), and again "a parallel and compatible title" (para. 6.76).

8. In an attempt to maintain this curious claim, Libya in its Reply developed the theme of indirect rule so that title to the B.E.T. rested with the local tribes, with the administration — executive and judicial powers — divided between the local tribes and the Senoussi Order while the Ottomans possessed some form of overarching authority with "minimal direct control"(RL, para. 7.65). This attempt reaches its height with the immediate introduction into the argument of the statement that "there is no prescribed form of federalism" (*ibid.*, para. 7.66) closely followed by the announcement that "[a] distinct type of shared territorial sovereignty has been known in international law under the term "condominium"" (*ibid.*, para. 7.67). So we are led to believe that the "shared sovereignty" claim really amounted to either a federal arrangement or a condominium. A federation, of course, is based upon a defined and formal division of internal sovereignty, while a condominium exists, as Oppenheim notes, "where two or more States exercise sovereignty conjointly over a territory" (*International Law*, 9trh ed., at p. 565). The Chamber of the Court itself only recently referred in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* to historical examples of condominia "in the sense of arrangements for the common government of territory ... between two or more States" (*I.C.J. Reports 1992*, p. 597, para. 399). I am unable in this case to identify the "two or more States" concerned.

9. Yet another expression of the relationships of the Parties as maintained by Libya in the oral hearings is that the indigenous peoples organized by the Senoussi Order held the title, but were represented by the Ottoman Empire (CR 93/14, p. 26). This looks to me remarkably like a protectorate, but one swept into being out of thin air. And protectorates simply cannot arise

like that. They require formal agreements providing for the formal division of the attributes and exercise of sovereignty and indeed recognition by third States where relevant rights and obligations are asserted, as noted in the *Nationality Decrees Issued in Tunis and Morocco* case (*Advisory Opinion. 1923, P.C.I.J., Series B, No. 4*, p. 27).

10. At no stage is there any suggestion whatsoever of any form of recognition or even of simple reference by third parties or indeed by the Ottoman Empire or by the Senoussi Order of such intricate and crucial federal or condominium or international representational arrangements with regard to the territories in question, nor any such reference by the indigenous peoples themselves. There is no hint of how such an arrangement operated in practice and which party exercised which particular sovereign rights. Without such a formalized and accepted arrangement, it is mere assertion to talk of federalism or condominia or shared sovereignty. It is for Libya which claims this unusual form of divided sovereignty to prove it.

11. Perhaps some of these formidable problems gradually dawned upon Libyan counsel, for I note that Professor Crawford emphasized that one could look at the situation in the region in 1912 either as a partnership (and here reference is made to protectorates, federations and condominia) or as a coalescing of allegiance, administration and social organization

> "even though none of the social or political units within the entity is alone the repositary of all these elements and even though the relations between the various units may sometimes be strained" (CR 93/19, p. 60).

Well, Mr. President, Members of the Court, something is clearly strained. There is, however, one further point to note here. Professor Crawford has sought to cite the *Lighthouses in Crete and Samos* case (*Judgment, 1937, P.C.I.J., Series A/B, No. 17*) as evidence that until a subordinate unit has entirely broken away, it is proper to treat the entity as a whole as a single State. That is fine. But it is not appropriate here in order to establish the unity of the B.E.T. with the Ottoman Empire through coalescence. In this situation, one is not dealing with a particular territory on the point of formal and internationally recognized secession from a State, but the alleged expansion of a State upon the basis, it must be said, of questionable evidence. The two situations are clearly not analogous.

The Ottoman Empire

12. I turn now to consider the position of the Ottoman Empire, upon which Libya now places such heavy reliance. Prior to 1908 it is quite apparent that the Ottoman Empire exercised no effective authority at all in the territory in question and there is clear evidence to this effect. Several British official documents emphasize this. For example, in a memorandum of 26 February 1902 from the Intelligence Division to the Foreign Office, it was noted:

> **"[a]s regards the southern boundary of Cyrenaica, although Turkey has made vague claims to an almost unlimited hinterland, Turkish authority has never been exercised south of the oasis of Jalo and Aujila" (CMC, Ann. 4).**

I now mark that area on the projection before the Court. Indeed, Libya itself has openly admitted in its Counter-Memorial that in the period around 1900 "the Ottoman occupation of the region had not yet occurred" (para. 4.131).

13. It is also evident that in 1908, the Turks had not even established their authority in the oasis of Koufra (well to the north of the B.E.T.). A series of British despatches from Benghazi to the Foreign Office confirms this. In a letter dated 18 July 1908, for example, it was emphasized that the mission of Hadjii Suleiman Effendi (Mayor of Benghazi), taking presents and an Ottoman flag to the Senoussi ensconced at the oasis, proved a failure since the local inhabitants refused to allow the Ottoman flag to be flown (CMC, Ann. 9). Ricciardi has concluded in his exhaustive survey in the *Yale Journal of International Law* that the Senoussis and the local inhabitants joined together in "rejecting even a purely formal recognition of Ottoman authority over the area" ("Title to the Aouzou Strip: A Legal and Historical Analysis", 17 *Yale Journal of International Law*, 1992, pp. 301, 350). The point put to the Court by Professor Dolzer on 20 June (CR 93/20, p. 31) that the "Senoussi peoples" welcomed the Ottomans is hardly borne out by the facts. Indeed, as the Libyan Memorial itself states in relation to the establishment of an Ottoman presence in Tibesti in the period 1908-1909, "the Senoussi did not favour this move" (para. 4.130). The local tribes also failed to demonstrate enthusiasm for the Ottoman advance. For example, while it is true that the *Derde* (or leader) of the Tibesti Toubous sought some Ottoman assistance in 1907 as the French advance moved

towards the B.E.T., this was followed by an appeal to the French Commander in Bilma for help soon thereafter (Ricciardi, *op. cit.*, p. 349).

14. The record indeed demonstrates that a small Turkish unit arrived in Tibesti in 1908 or 1909 and that it was only during 1911 that Turkey decided to reinforce the few soldiers it maintained there and seek to establish its authority in a real sense (CMC, Ann. 23). One may pause briefly here to note that the arrival in that year of the Turkish Captain Ahmed Rifki in the Ain Galakka region led to an exchange of correspondence with the French in which the latter made it clear that since France had pledged to remain neutral in the newly erupted Italo-Ottoman war, they felt constrained from taking any military action against him (RL, Exhibits Part B, 10.4 and 10.6). This was all that there was to the famous *modus vivendi* so heavily relied on by Libya: a decision simply to maintain the rules of neutrality in a war between two other States. But even so, the French emphasized that such enforced inactivity was undertaken upon an express reservation of their rights to the B.E.T. region *(ibid.)*. In any event, this Turkish presence proved indeed short-lived. By the spring of 1912, Turkish troops had commenced vacating the area (CMC, Ann. 27).

15. Not only was the Turkish presence in the B.E.T. brief and precarious, it appears to have been solely and purely military. This was not disputed in the Libyan Memorial (paras. 4.126-4.134), although the Libyan oral pleadings have now pointed to the civil administration dimension of the Ottoman presence, without giving any clear evidence of this (see e.g., Professor Dolzer, CR 93/20, pp. 23 and 34). It is noted that the *Derde* of the Tibesti Toubous sought Turkish help following the French raid on Ain Galakka in 1907 and was given the title of *kaimakam* for the Tibesti region, but as already noted, he, the *Derde*, turned soon thereafter to the French for help. The mere provision of an Ottoman title, a paper title, unsupported by other meaningful evidence of the exercise of sovereign authority demonstrates little.

16. It is perhaps this inability to demonstrate any real civilian aspect to the short-lived Ottoman presence that has induced Mr. Maghur to note on 19 June that "Ottoman rule was indirect or delegated" (CR 93/19, p. 12). This allows a convenient circularity. For the

inadequacy of the Ottoman presence is to be remedied by reference to the Senoussi Order and the indigenous populations. To this, I shall return. But at this point, Mr. President, Members of the Court, I wish to emphasize that whatever the Ottoman presence amounted to in practice, such presence was not uncontested. As is apparent from documents appearing in our written pleadings, between 1908 and 1911, the French protested against the Turkish presence in the region and emphasized that the territory was part of the French sphere of influence established under the Franco-British arrangements (CMC, Anns. 11 and 16). I would particularly note that when the Ottoman Government accepted that a Franco-Ottoman Commission should meet in autumn 1911 in order to demarcate the border between Tripolitania and French Sahara, the French Government specifically informed the Ottoman authorities that

> "[l]es commissaires français se refuseront à considérer les mesures prises par les autorités turques pour étendre la domination ottomane sur le Tibesti and le Borkou comme constituant des titres en faveur de la Turquie" (*ibid.*, Ann. 25).

17. This pattern of protest is a very relevant factor in assessing the value of such activities in the context of the establishment of territorial title. As Karl notes in the *Encyclopaedia of Public International Law*, "[i]n legal terms, protest is a unilateral juridical act in that it excludes legal effects which would result from its absence" ("Protest", *Encyclopaedia of Public International Law*, ed. Bernhardt *et al.*, Vol. 9, 1986, p. 320). One of the legal effects of a protest is to rebut any presumption of acquiescence (*ibid.*, p. 323). Protest also serves another role, of course, and that is to preserve existing rights, so that the French in so acting both questioned any title the Turks asserted and underlined their own rights. No matter how exiguous the manifestations of Turkish presence in the B.E.T. were in fact, the French authorities were not prepared to accept them and so they protested.

Mr. President, five minutes will enable me to finish a particular part here. I was wondering whether ...

The PRESIDENT: Yes, carry on for five minutes.

Mr. SHAW: Thank you very much.

18. The Turkish presence in the B.E.T. was thus brief and tenuous. It is well recognized

that a claim to title based upon the display of authority rests both upon the intention to act as a sovereign and the actual exercise of such authority (as noted, for example, in the *Eastern Greenland* case, *(Judgment, 1933, P.C.I.J., Series A/B*, No. 53, pp. 45-46)). This exercise of authority is crucial not only with regard to the constitution of sovereignty, but also with regard to its continuation (as stated in the *Island of Palmas* case, 2 *RIAA*, p. 839). Initial State activity is a starting-point only; without its continuation over time at a certain level of intensity, it would prove insufficient to generate an international title. While the acquisition of title is indeed a relative concept, dependent to some extent upon local conditions, there is nevertheless an indisputable core of sovereign activity that is required irrespective of the nature of the territory concerned. This is particularly so if the activity is contested. Cursory endeavour cannot suffice. Judge Huber in the *Island of Palmas* case, for example, declared that occupation "to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals" (*op. cit.*, p. 846). It follows inevitably from this that a minimal and purely military presence with no civil activity undertaken in the territory operative only over a very few years intermittently simply cannot meet the required criteria. The level of Turkish activity was accordingly significantly below the minimum required. In addition, demonstration of the necessary *animus occupandi* requires rather more than simple assertion by Libya, especially in view of the claimed partition of civil rights.

19. Indeed, Mr. President, Members of the Court, even Professor Cahier felt impelled to admit of the claimed rights of the Ottoman Empire that "ces droits n'étaient pas clairement établis" (CR 93/17, p. 13). Indeed so. The indisputable fact is that the Ottoman presence was meagre, territorially circumscribed and above all transitory. They did not stay. They left and this cannot be without legal consequence.

Mr. President, Members of the Court, I am grateful for the extra couple of minutes and this would be a convenient moment to break and I would wish, with your permission, to continue tomorrow morning.

The PRESIDENT: Yes, thank you Professor Shaw. We will continue tomorrow morning at 10 o'clock.

The Court rose at 1.05 p.m.

CR 93/24

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Wednesday 30 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case Territorial Dispute
(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 30 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial
(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Professor Shaw.

Mr. SHAW:

1. Mr. President, Members of the Court, yesterday I sought to express some of our concerns with regard to the way in which Libya has characterized the claims of the Ottoman Empire, in particular the somewhat confusing concept of shared sovereignty or coalescence. The weakness of the Ottoman position on the ground was noted together with the, at best, ambivalent attitude adopted by the Senoussis and the local tribes towards them. France constantly consistently protested against perceived Ottoman encroachments within the region.

Libya, however, has raised another argument in the attempt to establish Turkey's title and this is the doctrine of the hinterland. It is alleged that "[t]he Ottoman *hinterland* claim embraced the Libya-Chad borderlands lying south of Tripolitania" (CML, para. 4.13; emphasis in original) and that Italy succeeded to all Ottoman titles, 'rights' and claims (*ibid.*, para. 4.135). The use of this highly controversial doctrine in order to get around the paucity of Ottoman effective occupation is striking for, as Professor Crawford himself has noted, "hinterland claims were no substitute for the control of the acceptance of authority by the people of the territories concerned" (CR 93/19, p. 61).

2. The concept of the hinterland was proposed as a way of adding to the effective occupation of an African coastline a certain amount of contiguous territory inland. However, the whole status of this doctrine in international law was uncertain. At best it constituted an assertion of priority or preference as against other powers and *not* an independent source of title. It gave no rights. For it to be effective and operative, *inter alia*, actual recognition by other States was essential. As Schoenborn concluded, it constituted no more than a potential local competence producing of itself no juridical effect ("La Nature Juridique de Territoire", 30 *HR*, 1929 V, p. 175). Indeed, the United States Secretary of State declared in 1896 that the theory and practice of the hinterland were "unknown to international law" (*ibid.*, p. 212). Accordingly, the view that the doctrine formed part of international law is controversial at best. Even if it had a basis in law, the doctrine clearly did not apply in the instant case. In any event, hinterland claims remained just that. Claims.

3. It must be emphasized that the relevant Powers (including Italy) certainly did no recognize Turkish claims to a Tripolitanian hinterland as expressed in the Ottoman not of 30 October 1890 (MC, Anns. 20-21). Indeed, this rejection of Ottoman claims by both France and Great Britain is expressly referred to in the Libyan Memorial (paras. 5.11-5.12). In a dispatch from the Italian Ambassador in Paris to his Foreign Ministry, it was noted that

> "[d]urant les années 1890-91, l'action diplomatique des quatres puissances diplomatiques (Italie, Autriche-Hongrie, Allemagne et Angleterre) n'a pas soutenu les prétentions territoriales de la Turquie qu'elle a formulées dans la note de contestation présentée à Londres et à Paris contre l'accord anglo-français du 5 août 1890" (RC, Ann. 1).

Italy, it should be noted, proceeded in 1902 to accept the boundary of Tripolitania as marked on the *Livre jaune* map, thus clearly rejecting any concept of a Turkish hinterland thrusting south towards and beyond Lake Chad.

4. Accordingly, the Court is entitled to ask why Libya has placed such store upon this doctrine and has displayed this map so often.

The Senoussi Order

5. I would like to now turn to Libya's contention that the Senoussi religious order somehow shared sovereignty with the Ottoman Empire in the region.

6. As the Libyan Memorial emphasizes, the Senoussi Order "was essentially a revivalist movement in Islam" that spread its message of religious revival across the Central Sahara along traditional trading routes (para. 3.49). Founded by the Algerian Grand Senoussi in Mecca, the Order spread into Tripolitania and Cyrenaica. It established its headquarters in 1856 in Djaraboub on the North Cyrenaican-Egyptian border, moving to the Koufra Oasis in 1895, approximately half-way to the B.E.T. Its influence spread south and a series of *zawiyas* or monasteries were constructed on the trading routes. The spread of Senoussi *zawiyas* is interesting. As the map (Libya, Judges' folder, No. 20) currently projected demonstrates, the, "areas under Senoussi control" (In reality areas of some Senouissi presence) including not insubstantial portions of northern Nigeria. Acceptance of the religious and trading influence of the Order is far from acceptance of the

Senoussis as an entity capable of holding or holding alone or in concert with others sovereign title to territory. In order to constitute such an entity at the least a certain level of organization and central direction is required and this did not exist.

7. The historical record demonstrates clearly that the organization of the Senoussis was centred upon individual *zawiyas* only and that there was little evidence of a uniting and effective central authority. Evans-Pritchard in his classic work on the Senoussis noted that "[t]he economic and political organization of the Order was crude" and

> "[i]ts administrative machinery was at no time adequate for effective control over such wide domains, with their poor communications and their manifold tribal, racial and cultural divergencies" (The Sanusi of Cyrenaica??, Clarendon Press, 1949, at p. 26).

8. It was only with the approach of the French from the south, that the Senoussi Order began to assume a military dimension. The headquarters of the Order established in 1899 in Gouro in the B.E.T. moved back to Koufra in 1902, only three years later as armed confrontations with the French developed. However, the military resources of the Order were exceedingly limited and it lacked an organized administration and infrastructure. Accordingly, it felt obliged to seek assistance from the Turks with whom it had conducted a previously suspicious and even hostile relationship.

9. Senoussi influence did to some extent of course have an impact upon the indigenous peoples and upon the Turks. Yet it would be unacceptable and incorrect to draw from this influence the conclusion of territorial sovereignty either alone or in partnership in a region where its presence was neither long-lasting nor comprehensive. The nature of Senoussi relationships with both Turks and the indigenous peoples, which veered from hostility to intermittent co-operation over short periods against the French, argue very strongly against this. In so far as the relationship with the Ottoman Empire was concerned, hostility and suspicion were the dominant concerns until the French moved to the borders of the B.E.T. and threatened further northward moves. This change occurred during 1908 and 1909 and lasted intermittently. As the Libyan Memorial itself makes clear, during the 1911-1913 period of increasing

confrontation with the French, there were two separate military groups operating, the Turkish forces on the one hand and the Senoussis on the other. The Libyan Memorial tries to explain this by stating that

> "[t]he fact that they remained as distinct groups reflected the fact that in the past they had had separate titles to the territory, for the defence of which they had determined to co-operate and act together against the French" (para. 4.134.)

The Turkish defeat a couple of years later marked the end of this anxious arrangement.

10. Mr. President, Members of the Court, I pause for a few moments to consider the legal aspect of the claimed link between the parties concerned.

Legal ties

11. The Court in the *Western Sahara* case was noticeable prepared to take into account the special nature of the Sherifian State, which was founded upon the common religious bond of Islam existing among the people and on the allegiance of various tribes to the Sultan (*I.C.J. Reports 1975*, pp.43-44). However, the Court emphasized that this special character did

> "not dispense the Court from appreciating whether at the relevant time Moroccan sovereignty was effectively exercised or displayed in Western Sahara" (*ibid.*, p. 45, para. 95).

In other words, the key factor is the objective display of effective sovereign authority. From this it follows that expressed ties of religious allegiance to the Caliph of Turkey would only be of relevance in the context of territorial title if this classic requirement were fulfilled. The nature of the relationship may be varied but the manifestation of sovereignty cannot. The argument that some form of relipious affiliation of whatever strength or weakness to the Caliph of the Ottoman Empire can or must be transmuted into ties of territorial sovereignty cannot be right.

12. Morocco sought to argue that the activities in Western Sahara of Ma ul-'Aineen, the leader of an Islamic revivalist movement there, could be assimilated to the Moroccan State itself, since that leader had acted as an agent of the Sultan. Ma ul-'Aineen and the Sultan had certainly co-operated against European colonial expansion and the Sultan had supplied arms to the marabou leader. Despite the evidence of co-operation, the Court took the view that it could not proved that

Ma ul-Áineen's activities were to be considered as having constituted as display of the Sultan's authority in Western Sahara at the relevant time (*ibid.*, p. 47). Co-operation in a common cause against a common enemy is not sufficient to demonstrate ties equivalent to territorial sovereignty.

13. Professor Crawford has argued with regard to the "actual exercise of political control" that what matters is the acceptance of the authority of a superior and the manifestation of that acceptance (CR 93/19, pp. 56-57). These elements could not be demonstrated by Morocco. In particular, it is noted that the Court held that there existed no convincing evidence of allegiance to the Sultan of Morocco.

14. However, we need to look rather more closely at what the Court felt was inadequate in this context. The Court in fact noted that information before it "shows the display of some authority by the Sultan, through the Tekna caids, over the Tekna septs nomadizing in Western Sahara" (*op. cit.*, at p. 48) and that "a legal title of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory"(p. 49). Such evidence in that case included documents relating to the recovery of prisoners held captive by the Tekna, documents showing that the Sultan upon visits to the south of Morocco in 1882 and 1886 had received the allegiance of certain nomadic tribes specifically travelling from Western Sahara for that purpose and letter from the Sultan to the Tekna caids requesting the performance of certain acts in the territory (p. 48). In addition, the Court accepted that there had been

> "international recognition at the time of colonization of authority or influence of the Sultan, displayed through the Tekna caids . . ., over some nomads in Western Sahara" (p. 56).

This took the form for example of diplomatic documents relating to the recovery of shipwrecked vessels.

15. It is Chad's strong contention that Libya has failed to demonstrate even this level of ties between the Caliph of the Ottoman Empire and the tribes (or even some of them) of the B.E.T. We have no evidence of a formalized structure of influence through tribal leaders in the B.E.T. analogous to the Western Sahara situation. We have seen little of any international recognition of the rights or even influence of the Caliph in the B.E.T. And, of course, in the *Western Sahara* case,

the Court felt that the internal and international evidence provided was insufficient to demonstrate ties of territorial sovereignty.

16. Professor Crawford has argued that the Sultan's role in that case was limited to political influence as district from direct or even indirect control (CR 93/19, p. 58). It is claimed upon the basis of dicta from the *Dubai/Sharjah Boundary Dispute* (91 *ILR*, p. 543) that "allegiance and control" are "complementary criteria for sovereignty, with deficiencies in the one able to be compensated for by the presence of the other" (*ibid.*, at p. 59). Thus allegiance of itself apparently may remedy defects in the display of authority. Although the Court of Arbitration distinguished the *Western Sahara* case in the light of differences in the region, one cannot let this argument proceed without comment. The Court in the *Western Sahara* case was very clear. Religious ties, it was affirmed, do not dignify legal ties of sovereignty or subordination. Political ties of allegiance to a ruler may, but they,

> "must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise there will be no genuine display or exercise of State authority." (P. 44.)

Thus allegiance and control are both required. One is preceded and not replaced by the other. The paucity of Libya's argumentation is revealed.

The indigenous peoples

17. Mr. President, Members of the Court, this brings me to a consideration of the situation of the rather neglected and certainly misrepresented indigenous peoples of the B.E.T., for Libya has consistently and constantly referred to the local peoples as "the local Senoussi tribes" (CR 93/14, p. 26) or "the Senoussi peoples" (CR 93/20, p. 37).

18. The territory of the B.E.T. is sparsely populated and inhospitable. The population is either nomadic or semi-nomadic and there exist relatively few oases. A mixture of tribes inhabits the region, with the most important by far being the Toubous (divided into two groups, the Teda and the Daza). The semi-nomadic Toubous are loosely organized into clans, whose members generally number in the hundreds only. They are not therefore analogous to a unified and organized tribe with

a central single authority figure. Chapelle noted that: "Toute hiérachie est absente, toute cohésion est temporaire et fragile. La vie sociale est donc extrêment fluide." (*Le Peuple Tchadien*, 1986, L'Harmattan, p. 168). Clands do not constitute permanent institutions and as one writer has noted they break up and recombine over time "in a never-ending series of piecemeal disintegrations and local reconsolidations" (L.C. Briggs, *Tribes of the Sahara*, 1960, p. 170, cited in Ricciardi, *op.cit.*, p. 321). Toubou society is extremely individualistic. The authority of any particular chief or of any particular group will depend upon his own influence and the circumstances of the time. The division of Toubou society into widely dispersed and independent clans of fluid composition has clearly prevented the emergence of one organized entity in the area and this has been crucial in the context of international territorial sovereignty, though not, of course, with regard to rights over the land.

19. The Toubous also drew heavily upon a wide variety of cultural influences. Apart form the Senoussi Order, the importance of the Tidjaya Brotherhood needs also to be noted (Chapelle, *op. cit.*, at p. 152). One must also advert to the influences upon the Toubous of cultural ties with the regions to the south (Kanem), the east (Egypt and Sudan) and the west (Morocco). Islam came to the Toubous to an extent from Morocco and the Arabic language from Egypt and Sudan.

20. The ties between the local tribes and the Ottoman Empire were intermittent and in constant flux. The Toubous had, for instance, been engaged in armed hostilities with the Ottomans for many years in the Fezzan border regions. But even when that relationship moved to temporary co-operation in the light of the French advance, the conclusion that co-operation in the light of the French advance, the conclusion that co-operation and assistance as such amounted to ties of territorial sovereignty is not sustainable.

21. While the relations between the indigenous peoples and the Senoussi Order demonstrated some influence exercised by the latter upon the former, it really did not go beyond this. In 1902, for example, one of the peoples in the region, the "Awlad Sulaiman divided into two factions, one supporting the French and the other the Senoussis (Ricciardi, *op. cit.*, p. 471). Ricciardi notes that "[h]istorians have unearthed little evidence showing that the Toubous ever accepted Senoussi authority". Although now Toubou chief, *Derde* Chadi did form links with the Senoussi Order, he

strenuously objected when Senoussi envoys began to interfere with the administration of justice in Tibesti and the envoys had to be recalled (*ibid.*, p. 343). There was some co-operation between the Toubous and the Order against the French, but to draw from this ties of sovereignty is to fly in the face of historical fact. Indeed Zeltner, in his exhaustive survey, has concluded that one of the reasons for the failure of the Senoussi Order in Chad was the "esprit indé pendent et anarchique des Oulad Suleymand et des Toubous" (*Les Pays du Tchad Dans La Tormente 1880-1903*, L'Harmattan, 1988, p. 265).

22. It is therefore inaccurate to talk of the Toubous as having been led or organized them as "Senousti tribes" as Libya sought to do. More than that, to describe Libya as the sole successor to the Senoussi Order is misleading. The cultural and religious influence of this Order has had an impact upon many areas, right across Central and Northern Africa to a greater or lesser extent, of course. All the various peoples inhabiting that vast territory from Libya to Algeria and Nigeria to Sudan and Chad are thus as much inheritors of the cultural traditions of the Senoussi Order as is Libya itself.

23. Of particular interest here is the situation as discussed by the Court in the *Western Sahara* case with regard to the "Mauritanian entity". The Court noted that the

> "independence of the emirates and many of the tribes in relation to one another and, despite some forms of common activity, the absence among them of any common institutions or organs, even of a quite minimal character"

led to the conclusion that the claimed entity was not a legal entity distinct form its members and was thus unable to enjoy any form of territorial sovereignty in Western Sahara (*op. cit.*, p. 63). It is submitted that this is the situation as it existed in the B.E.T. prior to the French colonization.

24. However, the Court went onto say that the absence of territorial sovereignty did not mean that the "Mauritanian entity" or collection of groups with common links in the relevant area at the relevant time could not possess legal ties over the territory in question. In fact, the Court was prepared on the basis of the nomadic culture of the region to accept the legal ties existed between the territory of Western Sahara and the groups constituting the "Mauritanian entity". This is also analogous to the situation int eh B.E.T. The Toubou peoples clearly exercised legal rights over the

territory, but such rights in the light of the circumstances already discussed did not amount to territorial sovereignty under international law and cannot be confused with such.

Conclusion

25. Mr. President, Members of the Court, I conclude with the following comments.

26. The Libyan claims with regard to the question of original title are confused and confusing. Such exercise of Ottoman sovereignty as there was at the relevant time was ephemeral, disjointed and exclusively military. The Ottoman Empire clearly did not acquire any title to the B.E.T. in the years immediately preceding the French occupation. The religious Senoussi Order never exercised sovereign authority over the indigenous peoples nor acted as "agent" for the Turkish authorities. The indigenous peoples, divided amongst themselves and staunchly individualistic and independent, never succumbed to either the Turks or the Senoussi Order, nor were they sufficiently socially and politically organized to acquire for themselves territorial sovereignty as understood in international law. They did, however, possess legal rights with regard to the territory, rights that international law accepts as valid but not as amounting to sovereign title.

27. Libya seeks to rescue a week argument by adding to it two further weak arguments. But three controversial assertions in unison do not amount to a good source of title. One wrong does not make a right, nor do two or even three.

28. Mr. President, Members of the Court, I am very grateful for your kind attention, and would ask that you now call upon my colleague Professor Higgins.

The PRESIDENT: Thank you very much, Professor Shaw. Professor Higgins.

Mrs. HIGGINS: Mr. President, Members of the Court, I wish to address submissions to you this morning on the legal preconditions for French colonial title.

Legal preconditions for French colonial title

1. The territory that is now Chad was not a void, devoid of inhabitants, before the arrival of the French. Various people lived there — individuals, tribes, religious groups. They were not

organized as a State and there was, as Professor Shaw has just demonstrated, no one tribe or leader that could dispose of title to the entire territory, nor even diverse tribes who together held title to all the various parts of the territory. But nor was it *terra nullius* — and Chad has never claimed this. What divides us and Libya is the consequence of that fact that Chad was not *terra nullius*. Does it mean, as a matter of law, that France was unable to acquire colonial title? For, having agreed the 1899 line with Great Britain as a limitation upon its sphere of influence, France had then set about acquiring sovereignty over the territory that lay behind this line to the south.

2. Libya has argued that no title *could* have been acquired by France, partly because of what it alleges to have been decided by the Court in the *Western Sahara* case, and partly because it is said that such French *effectivités* were of themselves illegal.

3. My submissions address each of these Libyan contentions in turn. And, in making them, I refer both to what Libya has said in its written pleadings and what Professor Crawford has said in this oral phase. So I'll begin with the meaning of the Court's findings in the *Western Sahara* case.

I. THE MEANING OF THE COURT'S FINDING IN THE *WESTERN SAHARA* CASE

(See C/M, p. 461, para. 6.42 and p. 471; C/CM, p. 100, para. 3.12; p. 240, para. 6.04; and pp. 260-268, paras. 6.60-82; L/R, pp. 204-207).

4. Libya contends that the *Western Sahara* case makes illegal, even by reference to intertemporal law, the acquisition of colonial title in a territory which was inhabited by tribes, unless it was done by friendly treaties. What Libya has done is to take a phrase of the Court and to use it as purported authority for much more than it was ever meant to, or can, bear.

A short passage was drawn up by the Court to answer a particular point: the techniques is then to deduce from it legal principle after legal principle, even if such alleged principles were never in view and even if the consequences would be extraordinary and surely never intended by the Court.

5. The short finding of the Court, that is the starting-point, paragraph 79 of its Opinion, is that:

> "a determination that Western Sahara was a *'terra nullius'* at the time of colonization by Spain would be possible only if it were established that at the time the territory

belonged to no-one in the sense that it was then open to acquisition through the legal process of occupation" (*Western Sahara, Advisory Opinion, I.C.J. Reports 19*, p. 39, para. 79).

6. What is the significance and reach of this celebrated dictum?

7. What we know — and what Libya ignores as irrelevant to our understand of the scope of what the Court was saying — is that Spain's colonial title to Western Sahara was not based on a claim to have been able to occupy a *terra nullius*. It had concluded agreements with local leaders. What the Court was saying — and it was indeed important, and innovatory — is that such agreements are not to be treated as of no significance, even if the powers these leaders exercised within the territory were less than those of sovereignty.

8. Libya takes this important but circumscribed passage to erect, with great confidence, certain legal propositions of the widest generality. Libya claims that we get from this that the B.E.T. was to *terra nullius* and that therefore no title could be derived from occupation. And this is followed by a claim in the Libyan written Reply that Chad argues that "the law was different from that maintained by the Court" (RL, para. 7.19). Chad does no such thing — it argues that the law maintained by the Court is different from that maintained by Libya — which is an entirely different matter.

9. Countless further iniquities by Chad have been claimed, in the written pleadings and in the oral arguments. Chad's views represent those of the colonizing Powers (RL, para. 7.21); Chad insists upon a European public order (CR 93/19, p. 35); Chad turns it back on the rights of indigenous peoples (RL, para. 7.21); Chad refuses to accept that the Court ascribes international legal personality to tribes; Chad says that non-State entities have no rights under international law (CR 93/19, p. 39).

10. And from there Libya goes to show that many agreements were made in Africa with local rulers and insists that their legal personality cannot be denied (which apparently Chad is trying to do) (RL, para. 7.30 ff.).

11. Let us calmly retrace our steps. Let us try to retrace our steps from the starting-point of paragraph 79 of the Court's Opinion — so clear in its meaning and consequence to Libya.

12. Far from determining (unfavourably) the question of Chad colonial title, the key issue in our case is there left unaddressed. And I would suggest it is this: if there exists an indigenous population (the Toubou) insufficiently structured and organized to be regarded as having sovereignty over the B.E.T; or others (the Senoussi) with certain organized structures, but which structures are directed to religious rather than political ends, and which are neither general enough nor deep enough to have endowed them with sovereignty over the B.E.T, does *Western Sahara* stipulate that title could still be obtained only through entering into treaties with them?

13. But this cannot be read into *Western Sahara*.

Professor Crawford says that the Ninth Edition of *Oppenheim* has adopted this view. But paragraph 79 does not say this. And nor does it say so because its terms are repeated in *Oppenheim*. In paragraph 80 the Court appears to be saying that State practice shows that title was generally effected through agreement with authorities of the country rather than occupation of *terra nullius*. But that is not to say, as Libya would have it, that that was the *only* permitted form of title — especially where there was no "authorities of the country" with legal competence to pass title to the territory concerned. The Court was being asked whether Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain belonged to no one, was *terra nullius*. The Court answered that in the negative, finding that agreements had been made with chiefs who had competence to represent local tribes. Indeed, as

the Court made clear "Spain did not rely upon any claim to the acquisition of sovereignty over a *terra nullius*" (para. 81). The Court is pointed to the facts in issue and their necessary legal consequences.

14. So the Court noted that *generally*, the route to title was at this point sought in circumstances where there was a relatively organized structure. The Court expressly did *not* pronounce upon the legal value of any such agreements between a State and local chiefs, and that caveat one sees in paragraph 82. The Court also referred in paragraph 80 to the case of occupation in "a non-technical sense denoting simply acquisition of sovereignty". But it did not address the question in *this* case — namely, whether "occupation" in the non-technical sense, denoting simple acquisition of sovereignty, without pretence that this was occupation of a *terra nullius*, was not still lawful at the time.

15. The contention by Libya is that certain authors have, analysing the *Western Sahara* case, supported its view of this matter. The authors cited by Libya in its Reply (paras. 7.22 and 7.23 and accompanying footnote 16) clearly are *not* saying what Libya would have them say. They do indeed say — as they must — that after the Court's Opinion it is clear that agreements made by the colonizing Powers with important local tribes and leaders are more than methods of demonstrating colonial occupation. They have a certain importance, as do the tribes with whom they were concluded. But none of the authors cited read the Advisory Opinion as deciding that it is *only* through agreements, and regardless of status of the particular groups or tribes within a territory, that tile could have been acquired at the turn of the century. And *Oppenheim* having indeed repeated paragraph 79 of the Opinion says this:

> "The only territory which can be the object of occupation is that which does not already belong to any State whether it is uninhabited by persons whose community is not considered to be a State."

16. Now Libya invokes certain international arbitrations to suggest that they show indigenous tribes or particular rulers had international legal personality. It is hard to know why these examples, dealt with in the Libyan Reply at considerable length, are thought to be authority for anything in our case. In the first place, to participate in an international arbitration is a novel test of international

personality. Second, the Senoussi or Toubou participated in no international arbitration. And it is patronizing to treat all tribes and indigenous peoples as if they are interchangeable, as if their circumstances and conditions did not differ. The various peoples of Chad are not mechanistically to be assimilated to the Chief of the Griquas in the Transvaal (RL, para. 7.37) or the King of the Barotse (RL, para. 7.43), both of whom are dealt with at length in Libya's Reply. The status and capacities of each group within a particular territory are to be looked at separately — to see what rights they have over the territory to question and the implications for the acquisition of colonial title under law of the time.

17. It is hard to see the relevance of these arbitrations for our case (other than to show that where indigenous rulers seemed to have great local authority, agreements were indeed often made with them). Referring to the *Bulama* case, Libya asserts "the validity of such agreements entered into with local rulers as a base of title is not denied". But Chad has never denied this. Indeed, in central Chad France did enter into certain agreements. Nor does the listing of works by learned authors on treaties of protectorate in Africa, or on the role of treaties generally carry matters forward. (See especially Reply, p. 211.) They merely tell us that where there were groups with great local power, treaties were frequently made. They do not tell us, as Libya would have it, that title could not at the turn of the century be acquired by military means and effective occupation.

18. Mr. President, Libya, in the written phase, has made detailed allegations that Chad in fact knew that it needed to deal with the Senoussi to get title, and that the French contact with the Senoussi in 1911 shows this (ML, pp. 143-149; RL, pp. 217-218).

19. The French had in the previous few years overrun several of their *zawiyas* in central Chad and were generally aware of the hostility of this Order to the European advance. It was natural that the French should therefore seek to mitigate the enmity of this religious group, which was capable of exercising some influence in the areas of northern Chad and southern Libya inhabited by a variety of independent, intermingled and often warring tribes.

20. So on 19 June 1911, the French Minister for the Colonies sent a series of instructions to Mr. Bonnel de Mézières, the Chargé de Mission in Cairo. The first two concerned Ouadai, the

western part of central Chad bordering on Sudan. But the third instruction is headed "Koufra". And Koufra was well to the north of the Chad border, which was where in 1911 the Senoussi were based. The concern was that the Senoussi might cause difficulties in Ouadai. And the instructions suggested finding a formula to let the Senoussi exercise their customs (ML, French Archives Annexes, Vol. 3, p. 280).

21. now the archives are clear on the French response. The Governor-General of French Equatorial Africa wrote to the Minister for the Colonies reporting on what had happened. He noted that Colonel Largeau would now have to make clear that the real frontiers were those resulting from the 1899 Convention (*ibid.*, 10.12). And a Note of the French Ministry of the Colonies dated 11 July 1912 speaks of this incident.

23. That Note, which is overwritten with the comment that it was placed before the Minister the following day, states that

> "il y a vraisemblement eu à l'origine des pourparlers ouverts par M. Bonnel de Mézières, chargé de mission au Caire en 1911, avec Ahmed Cherif, un malentendu qui risque de compromettre tout espoir d'entente avec la zaouia de Koufra. Les instructions de M. Messimy en date du 19 Juin étainet conçues de telle sorte qu'il ne pouvait être, à aucun moment, question de reconnaître aux Senoussi des droits territoriaux quelconques." (ML, French Archives Annex, Vol. 3, pp. 156-157.)

The Note continues that de Mézières had written that the French had decided to establish a military post in Arada, but there was no intention whatever of going beyond this post or beyond its own frontier. The Note comments on this: "En écrivant cette phrase, M. Bonnel de Mézières a commis une grave imprudence et nettement outrepassé les instructions qui lui avaient été données." (*Ibid.*, p. 157.) He was recalled. (Ricciardi, 17 Yale *J.I.L.* (1992) 301 at 351.)

24. A letter from the Minister for the Colonies to the President of the Council and the Minister for Foreign Affairs of 1 August 1912 confirms the point (RL, Exhibits, Part B, 10.11). So the evidence discloses nothing by a mistake by a chargé de mission, seated in Cairo, exceeding considerably his clear brief. And the mistake was immediately corrected in no uncertain terms by the appropriate authorities.

The intertemporal aspects of the problem

Mr. President, Members of the Court, I now want to say something about the intertemporal aspects of our problem because there is another aspect of Libya's remarkable claims for what the Court has determined in the *Western Sahara* case. Libya insists that the respect that the Court pays to the rights of native peoples — a welcome tendency, Chad notes, echoed in recent years in the courts of Canada, the United States, New Zealand, and recently in Australia, too — means that *only* through treaties with them could colonial title have been obtained. But certain temporal problems do follow from this view. Either acquisition of territory in areas which were not totally uninhabited was *always* unlawful if not achieved through agreements, or, the Court's purported finding in 1975 retrospectively invalidated what was regarded at the time as perfectly lawful.

26. And I would like to take each of these in turn. They are, of course, closely related. So I begin with this question: did occupation, unaccompanied by agreements, of territories where individuals lived without forming themselves into the government of a State, fail to provide colonial title at all? And that is, of course, the desired legal consequence of the Libyan thesis.

27. But if the Court had meant to preclude, under the law of the period, the lawful extension of colonial title by military occupation and to which no treaties had been made with the indigenous people, then half the boundaries of Africa would lose their provenance. So, I might add, would colonial title in Australia, which is not based on treaties with aboriginal peoples, and in at least some parts of North America and Canada where treaties have not been concluded with local indians. Respect under international law for local rights — including, as in the Western Sahara, the right to assign by agreement — is one thing. Denial of international title under the international law of the time, is another.

28. It has never been accepted or even suggested that title to the current territories of African States is adversely affected by the fact that the territorial *extent* of particular States is not exactly co-terminous with agreements signed by the colonial Powers with various local tribes.

29. State practice during the 19th century affirms that the process of acquisition of title to African territories involved a variety of methods. The most common method was by the signature of agreements with local tribes which permitted the colonial Power to establish a protectorate or other

form of sovereign control over them. However, this was not the only means and the establishment of colonial sovereignty within the framework of an inter-European treaty partitioning agreed spheres of influence was often achieved in part by the use of force.

30. The colonial history of Ghana, Uganda, Rhodesia and Dahomey shows that, notwithstanding the presence of local tribe leaders, sovereignty was acquired through occupation. (See Metcalfe, *Great Britain and Ghana: Documents of Ghana History 1807-1857*, University of Ghana, 1964, p. 521; "The British Sphere, 1884-94", in Oliver and Mathew eds., *History of East Africa*, Oxford, Clarendon Press, Vol. 1, 1963, pp. 391, 431; *A History of East Africa*, Longmans, 2nd ed. 1963, p. 181; Marks, "Southern and Central Africa, 1886-1910", in Oliver and Sanderson eds. *The Cambridge History of Africa*, Vol. 6, Cambridge University Press, 1985, pp. 422, 439 *et seq.*; "Western Africa, 1886-1905", in *Cambridge History, op. cit.*, pp. 237-268.) It necessarily follows from Libya's insistence as to what the *Western Sahara* case decided that the boundaries today of Ghana, Uganda, Zimbabwe and Benin are also "unsettled" and that these countries have not succeeded to title over the territory encompassed within them.

31. In fact, the matter is more complicated for, just as in Chad, colonial title within a given territory was often secured by local agreements made in the one part, and conquest and occupation in the other. Thus half of Uganda, half of Ghana, half of Zambia and half of what is today Zimbabwe were brought within the British Empire by virtue of occupation and *effectivités* while the other half of each territory became part of the Empire through the conclusion of tribal protectorate treaties. There was absolutely no suggestion upon the independence of these countries — and nor has there been until now — that the national boundaries which these new States inherited depended upon the source of British title, that is to say, whether it has been acquired through treaty or otherwise. And even in those territories where treaties of protectorate had been important and extensive in their geographic scope (as in Zanzibar, much relied upon by Libya: see Reply, paras. 7.34-7.35), it was simply the British colonial boundaries that were determinative of the boundaries of independent Tanganyika and Zanzibar. Libya has pointed to nothing in the Lancaster House records of the independence negotiations of these countries, nor in the Acts of Parliament that

identified their frontiers upon independence, to show that any distinction was drawn between territory acquired the one way and territory acquired the other.

32. I turn now to the second related question. If the Libyan thesis is right, the Court in 1975 was requiring the most fundamental revision of the *uti possidetis* principle in general, and its adoption by the OAU in Cairo in 1964 in particular.

33. Libya has used various arguments to contend there is no treaty line that forms a frontier. Her arguments about *Western Sahara* are part of the same strategy, this time designed to suggest that there is no frontier line to which the *uti possidetis* principle applies, because France never had title over the territory whose limits were marked by the 1899 sphere-of-influence line. And it never had title, says Libya, because the International Court in *Western Sahara* said that, save perhaps for territory that was totally unoccupied, colonial title required agreement with some local tribes or rulers.

34. This requires us to believe that in 1975 the Court was retrospectively rewriting what had been agreed by the OAU in 1964. The Court will recall that by the 1964 resolution "all member States pledge themselves to respect the borders existing on their achievement of national independence". The Libyan interpretation of the Court's answer to Question I in the *Western Sahara* case means that the 1964 resolution must now be read in one of the two ways: (1) *either* it is to be read as if it said "all member States pledge themselves to respect the borders existing on their achievement of national independence, in so far as those borders mark the outer limit of territory acquired through agreement with some sort of local group, of unspecified status"; (2) or — this could be an alternative — "all member States pledge themselves to respect the borders existing on their achievement of national independence, remembering that there will be no borders at all in existence unless the territory behind was acquired through agreement with some sort of local group". In short, the 1964 resolution, and the *uti possidetis* principle, far from being directed to the stability of boundaries, really authorizes that boundaries be ignored, and force be used across them, unless they come into that particular category that marks the limits of the territory acquired through agreement with local rulers.

35. There is not, anywhere in all the contemporaneous records of the OAU at the time, the whiff of a suggestion that this is what States thought the resolution meant. Such a meaning was never suggested in any quarter, let alone adopted as the hidden meaning to the 1964 text.

36. I leave aside here that Libya had entirely failed to reserve its own position under that resolution, in contrast to others (MC, para. 104) who perceived themselves as having an unresolved boundary dispute at the time. So I do ask the Court whether we are to believe that a — again ignoring the intertemporal principle — the International Court's purported findings in *Western Sahara* now required the 1964 resolution to be read this way? Or that the entire corpus of case-law which has invoked the *uti possidetis* principle must now be reviewed to see if the territory in question was indeed acquired only by agreement?

37. Where dos that leave us? The formative case-law on occupation often arose in respect of territories where there were no organized communities — the *Clipperton Island* case affords a classic example (39 *RGDIP* (1932) 129; 26 *AJIL* (1932) 390). We know from such cases that where there is a *terra nullius*, occupation gives original title. We have known this for a long while.

38. We know now, since the *Western Sahara* case in 1975, that where in a territory not itself an independent State there are tribes with certain structures of organization and territorial rights, that treaties made in the colonial era with them also gave good colonial title.

39. That is what the *Western Sahara* case is authority for — not for may other things never in issue before it, and which would have had extraordinary results. There is nothing in that case that, to use the phrase of the Agent of Chad, invites us to a retrospective audit of colonial titles acquired, to strike down titles obtaining through military occupation and *effectivités* rather than through treaty.

II. LIBYA'S CLAIM THAT FRENCH MILITARY ACTION WAS UNLAWFUL AND COULD NOT FOUND TITLE

40. Mr. President, I turn to the second heading in my submissions, namely, Libya's claim that French military action was unlawful and could not found title.

41. Professor Bowett told you that Chad must make a choice: it can only argue that it acquired title by occupation if the territory was *terra nullius*; and as the territory wasn't *terra nullius*, it can only base itself on territorial title through conquest.

42. Now, Chad does not accept that these are the choices. In the first place, those stark choices are based on a reading of *Western Sahara* that we do not share. And second, it does not accord with the realities on the ground and how the law perceived them at the time.

43. Whatever the nature of rights that the Senoussi had exercised as religious leaders, by 1913 they had gone from the B.E.T. And the French were there. And whatever we would think today, they controlled in a manner acceptable in the era the diverse manifestations of hostility at their presence. This was neither occupation of an empty land nor conquest of an independent State.

44. This use of the military instruments was coupled with legislative acts and followed by acts of civilian authority — all evidence *animus occupandi* and effectiveness in doing so. And in the next section of Chad's oral pleadings, Professor Cassese will show the Court the evidence of these *effectivités* and point to the way in which title was indeed consolidated up to the frontier. The boundary line thus became a true frontier.

45. In describing colonial entitlement in *terra nullius*, the term "occupation" has had a certain precision. In describing the acquisition of title in Africa, with the many variations in circumstance, the terms occupation *and* "conquest" have often been used with a certain imprecision. Conquest is usually reserved for military subjugation of the forces of a sovereign State. It does not seem to describe the occupation of the B.E.T., where military activity was directed against the Senoussi and others who did not have international title. In any event, contrary to what Professor Crawford said, that old law did not deny that conquest was a root to title, providing only that treaties were valid even if they had been procured by force (CR 93/19, p. 65). But Hall, writing at the turn of the century, spoke of conquest consisting of "the appropriation of the property in, and the sovereignty

over, a part of the whole of the territory of a State" (Hall, W.E., *A Treatise on International law*, Oxford, 1895 at p. 586). Evidence of the fact of conquest usefully show an intention to appropriate. But neither, Hall makes clear, was necessary — it was the evidence of the acquisition of title that was required (*ibid.*, p. 588). And Professor Cassese will show that evidence by reference to the *effectivités* on the ground and to French proclamations. And by 1919 France certainly had good title.

46. But Libya has further argued that from 1919 France was bound by the terms of Article X of the Covenant of the League

> "to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League".

Now this observation, Mr. President, was supplemented by an invocation of the principle of *ex injuria jus non oritur* and reference to your own comment in *The Acquisition of Territory in International Law*, that "an international crime of the first order" cannot itself be pleaded as a root of title.

47. Noting that Libya's numerous reference to "aggression" and "the territory of others" merely ignored the application of intertemporal law, which at the relevant time permitted colonial domination to be imposed by a combination of force and *effectivités*, though today such acts would not give title, Chad offered a detailed analysis of the Covenant and the Kellogg Briand Pact to show that Article X meant exactly what it appeared to mean, and no more — it was not concerned with phenomenon of colonialism, but with inter-State conflict.

48. And Chad's conclusions, as to the dates by which conquest and occupation had been completed, as to the incorrectness of Libya's assertion of French withdrawal from the region in 1916, and as to the scope of the obligations of the Covenant and the Kellogg Briand Pact, are in our Counter-Memorial (CMC, pp. 119-120). And I won't return to them, save to say that if it had really been unlawful after 1919 to secure colonial title by the use of force followed by *effectivités*, the League Council would have shown its disapproval.

49. And it is interesting that Lindley, writing his famous treaties on colonial expansion in the year 1926, still speaks of conquest being "at present recognized by international law without regard to the justice or injustice of any particular acquisition" (Lindley, M. F., *The Acquisition and Government of Backward Territory in International Law*, Longmans, Green and Co., Ltd., 1926).

50. Chad's contention that Article X of the Covenant had nothing to do with the manner of acquisition of colonial title has been described by Libya as "highly unattractive thesis". Large parts of the history of colonialism, and the legal concepts that supported it, Mr. President, are "highly unattractive". But intertemporal law does not allow us to pretend that later, more palatable laws applied in the years before these more acceptable notions had evolved. Libya insists that this must man that "colonial aggression" remained lawful. But as Libya well knows, this simply begs the question of what *was* regarded as "aggression" at the time. And, palatable or not, colonial conquest and occupation was *not* regarded as "aggression" in 1913, nor in 1919.

51. Now, Chad is chastised for a reading of the law of the time that failed to protect the sovereign rights of non-State entities said to be proclaimed by the Court in the *Western Sahara* case. Libya does not identify where in the *Western Sahara* Advisory Opinion the Court holds that non-State entities held "sovereign rights". This is another example of reading into the Court's comments whatever one wants to. The Court had no occasion to make any finding on "sovereign rights" — still less what this meant — of local tribes in the Western Sahara in the period beginning 1884. Nor would any finding, even if it had occurred, necessarily apply to the very sparse population of the B.E.T. in 1910-1913. And there is simply no basis for the contention that because in 1920 League members were required to respect the territorial integrity and political independence of other members, the *Western Sahara* case somehow requires that to be read as prohibiting colonial title in the B.E.T. in 1910-1913. This ignores both the requirements of intertemporal law and logic.

52. By the Reply Libya had retreated from this convoluted line of argument (although it appears to be in play again in the oral argument). In the Reply, the central point (Reply, para. 8.17) was said to be that "at all relevant times" the "territory *did* belong to a sovereign State, moreover a member State of the League of Nations, namely Italy". This change of ground is quite remarkable.

The claim *now* apparently has nothing to do with the *Western Sahara* case in 1975 prohibiting retrospectively the violation of sovereign rights of the Senoussi at the time entailing the use of force was a violation of Italy's territorial integrity and political independence. The former is wrong on the facts and law; and the latter is wrong as a matter of law. Title had been secured in the B.E.T. by 1913. And, in any event, Italy brought no case to the League of Nations about French violations of Article X of the Covenant.

53. Professor Bowett has said that after the introduction of the new rules prohibiting war as a means of territorial acquisition, it became necessary to interpret the traditional rules of occupation in a manner so as to produce consistency with the new rule (CR 93/19, p. 75). Mr. President, this *has* been done — but not by Article X of the League Covenant and the Kellogg Briand Pact. It *has* been done by the United Nations and the law that it has developed on decolonization. What colonialism has done cannot be undone by trying to unravel *parts* of the past. The ravages of imperialism are being remedied by the provision of self-determination, territorial integrity, and stability of frontiers. And Professor Franck will return to that aspect.

54. Mr. President, Members of the Court: so far, because this is the ground that Libya has chosen to play on, we have been addressing these contentions in the context of our second and third alternative arguments. Could France ever have got title to transfer the sphere-of-influence line into an international frontier? And could France ever have got international title through its *effectivités*?

But, as the Court knows, the 1955 Treaty remains the heart of our case, and I would ask the Court this: why did Libya conclude a treaty on its boundaries with a State that, on its own argument, could never have secured international title to Chad? What was the purpose of the 1955 Treaty? We have now reached the point where we have a treaty that not only does not do what it clearly says, but refers without point to annexed instruments of reference — and it is concluded with a party said to have no legal rights over the subject-matter.

Mr. President, Members of the Court, the suspension of belief so successfully achieved by the brilliant optics of the Panorama Mesdag is as nothing compared to the illusions in which Libya requires us to participate. I thank the Court for its very kind attention.

Mr. President, I imagine this would be a convenient moment for the break and I would ask you after to call Professor Cassesse.

The PRESIDENT: Thank you very much, Professor Higgins. We will take our break now.

The Court adjourned from 11.20 to 11.35 a.m.

M. CASSESE : Merci.

LE RESPECT CONSTANT DE LA LIGNE 1899-1919

I. LES EFFECTIVITES FRANÇAISES

1. Introduction : L'importance des effectivités

1. Monsieur le Président, Messieurs de la Cour, mes collègues les professeurs Higgins et Shaw ont énoncé les bases théoriques et historiques de la *troisième* thèse tchadienne : c'est la thèse, Monsieur le Président, d'après laquelle les effectivités françaises d'abord, tchadiennes ensuite, sur le BET, y inclus la bande d'Aouzou, ont conféré à la France, et ensuite au Tchad, un *titre territorial additionnel* sur la région. Pour l'établir, point n'est besoin de se fonder sur les traités qui établissent la frontière et dont les conseils du Tchad ont parlé jusqu'à présent. Ce titre *additionnel* se fonde sur les principes de droit coutumier régissant l'acquisition de souveraineté par la possession effective d'un territoire, assortie de l'intention d'y exercer des pouvoirs souverains.

Ainsi, aux titres conventionnels initiaux de la France s'est superposé un second titre souverain, d'origine coutumière cette fois, et ayant un caractère territorial.

En dépit de leur origine distincte et de leur caractère différent, un lien s'établit entre ces deux titres. En effet, comme je le montrerai dans un instant, en vertu de l'occupation française, le titre coutumier a couvert un territoire, le BET, dont les *limites spatiales* coïncident, dans la pratique, avec le tracé indiqué dans les accord de 1899-1919.

2. Plan de l'exposé

2. Avant de commencer mon exposé sur les effectivités, permettez-moi, Monsieur le Président, de vous annoncer les thèmes sur lesquels portera ma plaidoirie d'aujourd'hui et de demain.

3. Monsieur le Président, ma plaidoirie montrera, en quatre points, la réalité des effectivités invoquées par le Tchad et leurs conséquences juridiques.

D'abord, il conviendra de s'interroger sur les caractères que doivent revêtir dans une région comme le BET, les manifestations d'autorité souveraine, pour être qualifiées d'effectivités — ce sera mon *premier* point. Au regard de ces caractères, nous verrons que l'emprise de la France sur ces contrées a été non seulement effective, mais encore constante et paisible. Du coup, cela me permettra de montrer le mal fondé des objections que la Libye a élevées à l'encontre de la troisième thèse du Tchad. Ce sera Monsieur le Président, mon *second* point.

Ce qui est frappant, Monsieur le Président, c'est que les effectivités françaises n'ont pas seulement été réelles, elles ont été aussi reconnues par l'Italie. Ce sera l'objet de mon *troisième* point que de montrer en quoi, sans conteste, les affaires du petit atlas italien de 1934, le traité Laval-Mussolini de 1935, l'incident de Jef-Jef de 1938 et, deux ans après, la convention franco-italienne d'armistice, tous ces événements marquent que l'Italie a non seulement pris acte des effectivités françaises, mais encore les a reconnues en tant que créant le titre territorial dont je vous entretiens.

On peut ajouter, Monsieur le Président, et ce sera mon *quatrième* et *dernier* point, qu'après avoir succédé à l'Italie, la Libye n'a pas remis en question cette reconnaissance. Plus même, elle l'a fait sienne, comme le prouve, d'une manière irréfutable, sa réaction lors de l'incident d'Aouzou en 1955.

3. Les effectivités françaises :

a) Deux remarques préliminaires

3. Monsieur le Président, Messieurs de la Cour, je commencerai par deux remarques préliminaires sur le principe de l'effectivité. Ma première remarque est que l'on ne peut comprendre la manière dont la France d'abord, le Tchad ensuite, ont exercé leurs droits souverains sur le BET, en faisant abstraction des *caractéristiques naturelles de la région*.

Il s'agit, vous le savez bien, d'une région essentiellement désertique. Messieurs de la Cour, j'ai eu la chance de visiter l'année dernière la partie du BET qui n'est pas soumise à l'occupation

militaire libyenne. J'ai été frappé, non seulement par sa beauté sauvage, mais surtout par une nature hostile à l'homme. Le désert règne partout en maître — désert de rochers et de basalte au nord, de sable au sud. On peut y voir surgir dans le lointain des chaînes de montagnes arides, qui grimpent rapidement vers le ciel, comme si elles voulaient empêcher tout passage. Cela vaut en particulier pour le Tibesti, dont l'énorme superficie (100 000 kilomètres carrés) est occupée par un massif montagneux déboisé et sans eau — *un véritable paysage lunaire*, Monsieur le Président.

4. Messieurs de la Cour, le BET est une région où la nature, superbe et agressive, semble poser à l'homme un défi presque insurmontable. On n'y rencontre que, de loin en loin, quelques rares oasis, où la vie se concentre autour d'un point d'eau. Quelques palmiers, de maigres vignes, du blé et quelques animaux faméliques en constituent les seules ressources. Des centaines de kilomètres, d'une solitude immense, les séparent. Ainsi, pour nous rendre de Faya, dans le Borkou, à Fada, dans l'Ennedi, il nous fallut environ une heure d'avion, au-dessus d'un océan de sable, où les dunes basses semblaient autant de vagues.

Comment s'étonner, Monsieur le Président, que ces données géographiques et naturelles conditionnent toute présence humaine dans cette région ?

La terre est pauvre; les communications sont difficiles. Les centres habités y sont rares et éparpillés sur de très vastes étendues. Même à l'heure actuelle, on ne compte guère que cinquante et un mille habitants sur un territoire plus grand que la France, avec une densité d'un habitant pour 20 kilomètres carrés dans la zone la plus hostile, le Tibesti. Ces habitants, pour la plupart des Toubou, sont essentiellement nomades. Cela tient à la nature hostile, mais aussi au fait que, par tradition, ils rejettent le travail manuel, qu'ils considèrent comme dégradant et qu'ils confiaient, autrefois, à leurs captifs.

Si j'insiste sur ces aspects géographiques et humains, Messieurs les Membres de la Cour, c'est parce qu'ils ont de tout temps conditionné la présence de l'Etat dans la région. A l'évidence, dans une étendue désertique de ces dimensions, il est à la fois *impossible* et *inutile* d'exercer une présence militaire et administrative aussi dense et régulière que dans une zone plus hospitalière ou plus peuplée. *Le Tibesti* n'est pas la *Hollande*, Monsieur le Président !

5. Cette évidence n'a pas échappé à la jurisprudence internationale, lorsqu'elle s'est penchée sur le concept d'exercice effectif de la souveraineté — et j'en viens à ma *seconde remarque préliminaire*, Monsieur le Président. Comme vous le savez bien, plusieurs tribunaux internationaux ont déjà eu l'occasion d'établir que les manifestations de souveraineté requises par le droit international varient en fonction de la nature et des caractéristiques du lieu en question (suivant qu'il s'agit de régions habitées ou désertiques). Il suffit de rappeler à ce propos la célèbre sentence de Max Huber dans l'affaire de l'*Ile de Palmas*, les sentences dans les affaires de l'*Ile de Clipperton* et des *Frontières du Honduras*, de même que l'arrêt, célèbre lui aussi, de l'affaire du *Groenland oriental*.

Dans toutes ces affaires, les tribunaux ont souligné que le degré d'effectivité de l'occupation pouvait varier en fonction de critères aussi divers que la situation géographique du territoire occupé, les possibilités d'accès et la densité de la population. Il s'ensuit que dans des régions difficiles d'accès et inhospitalières, où la population est rare et clairsemée, le droit international n'impose pas que l'exercice de la souveraineté soit *continu dans le temps* ou qu'il couvre *chaque portion* du territoire : il suffit, comme l'a annoncé la sentence arbitrale sur l'Ile de Clipperton, que l'Etat occupant soit "en mesure d'y faire valoir son autorité exclusive" (RSA, vol. II, p. 1110). Nous verrons, Monsieur le Président, que *tel* a bien été le cas en l'espèce.

4. b) L'exercice par la France de ses droits souverains

6. Passons donc à l'examen de l'exercice, par la France, de ses droits sur le BET jusqu'à l'indépendance du Tchad en 1960.

Je me bornerai à quelques rappels généraux, du fait que le Tchad s'est étendu sur cette matière dans ses écritures (voir mémoire du Tchad, p. 246-268).

Monsieur le Président, l'occupation française s'effectua en plusieurs étapes à partir de 1913. Rapidement les forces militaires françaises ont implanté des garnisons stables dans les principales oasis. Ce choix s'explique aisément. Dans ces immensités désertiques, les oasis, rares îlots de présence humaine stable, représentent aussi des points de ravitaillement indispensables à la survie des tribus nomades. Ce simple fait a déterminé la stratégie d'implantation française : il suffisait en

effet, pour maintenir son emprise sur la zone, de tenir ces centres vitaux. Et c'est bien là ce que firent les troupes françaises. Certes, les postes militaires du *Tibesti* furent évacués en 1916, et cela en raison des besoins de la lutte contre l'Allemagne au Cameroun. On ne doit cependant pas exagérer la portée de cette décision, car il en alla de même dans de nombreuses parties de l'empire colonial français (A. D. Roberts, éd., *The Cambridge History of Africa*, vol. 7, Cambridge U.P., 1986, p. 331). Du reste, à la même époque, des raisons semblables poussèrent les Italiens à se cantonner dans les villes de la côte tripolitaine (*ibid.*, p. 295). Qui plus est, le Tibesti fit l'objet de tournées militaires fréquentes tout au long de la période 1916-1929. Ce mode de contrôle territorial était pratiqué par la France dans tous les territoires désertiques qu'elle s'était appropriée.

Pour citer la sentence sur l'*Ile de Palmas* — décidément incontournable en l'espèce —, nous nous trouvons bel et bien en présence d'une situation où "l' intermittence et la discontinuité" restent "compatibles avec le maintien du droit" (RGDIP, 1935, p. 165). Qui plus est, dès que l'avancée italienne dans le Fezzan fera peser une menace sur la zone, la France rétablira une présence constante dans le Tibesti, montrant par là qu'elle n'entendait tolérer aucune interférence dans l'exercice de ses droits souverains.

Pour en revenir au BET en général, on ne peut pas échapper à la conclusion, Monsieur le Président, conclusion étayée par de nombreux documents historiques, que dans un laps de temps assez bref les forces militaires françaises ont acquis le contrôle effectif du BET. Monsieur le Président, en 1919, les Français étaient stablement implantés dans la région.

5. Les objections libyennes à l'encontre des effectivités

Mais la partie adverse a avancé *quatre objections* principales, pour contester la valeur des effectivités françaises.

1) Tout d'abord, elle a affirmé qu'à la fin de 1919, l'emprise militaire française n'était pas complète, car des troubles périodiques continuèrent jusqu'en 1930 (CR 93/20, p. 12).

Contrairement à ce qu'ont affirmé nos honorables contradicteurs, la soi-disant contestation des populations locales était loin de représenter un phénomène générale, une sorte de résistance armée généralisée. Les documents sur lesquels nos contradicteurs ont appelé l'attention de la Cour ne font

d'ailleurs état que de coups de main sporadiques de bandes de pillards ou de groupes isolés de Toubou. Selon un de ces documents,

> "l'esprit excessivement individualiste des Toubou les incite à la vie solitaire. Ils se réunissaient en bandes de pillards pour exécuter des rezzous, obéissaient pendant leur durée à un chef [...] et se séparaient aussitôt la razzia effectuée" (réplique de la Libye, vol. 3, pièce LR 7.4, p. 4).

Un autre texte cité par la partie adverse, l'*Histoire militaire de l'Afrique équatoriale française*, souligne que dans le BET, en 1914-1915, les opérations militaires françaises ont surtout pris la forme de "contre-rezzous", c'est-à-dire d'actions isolés visant à repousser des attaques de bandes de pillards (contre-mémoire de la Libye, pièces, vol. 2, p. 460).

Bref, les *rezzous* n'ont jamais mis en péril la mainmise de la France sur la région; le contre-mémoire libyen, fort riche en détails sur les opérations de 1915-1916, ne fait état que de quelques escarmouches isolées au cours de la période qui suit. Leur nombre et leur gravité se sont rapidement réduits, ce qui a permis à la France de consolider son acquis. J'en veux pour preuve un long mémorandum sur la frontière méridionale de la Libye, rédigé au début de 1925 par le ministère des affaires étrangères italien; on y prend acte de l'occupation effective française en ces mots : "La situation de fait [au BET] est constituée par la disparition de tout vestige de notre droit territorial sur *l'hinterland* libyen, complètement *avalé* par l'occupation française." (Mémoire du Tchad, annexe, p. 109.)

On ne peut être plus clair, Monsieur le Président : l'autorité française était bien implantée au BET, et les quelques troubles locaux sporadiques n'y ont rien changé. La partie adverse a donc tort; elle a tort quand elle veut nous faire croire que le BET était semblable au Liban d'il y a quelques années. Au Liban des années quatre-vingts, il n'y avait pas d'autorité centrale capable de maîtriser les différentes factions armées. En revanche, au BET il existait une puissance, la France, qui exerçait des attributs souverains, et cela d'une manière effective, et était donc pleinement capable de rapidement supprimer les troubles locaux, d'ailleurs isolés et sporadiques.

Monsieur le Président, qu'on ne nous dise pas que les documents historiques attestant l'emprise effective française sont exclusivement d'origine française, et, du coup, dépourvus de valeur probante.

Ce serait un mauvais procès.

D'abord, il n'y a aucun fondement à contester la fiabilité des rapports et des dépêches en provenance des Français qui occupaient le terrain. Mettons-nous à leur place : quel intérêt les Français du BET auraient-ils eu à fournir à Paris un récit inexact de la réalité ?

Qui plus est, nous l'avons vu et nous y reviendrons, les Italiens, qu'on ne peut certainement pas soupçonner de complaisance vis-à-vis de la France, ont constaté et relaté l'emprise effective française.

Plus encore, on peut trouver des rapports anglais, datant de 1919, qui font état, en termes "on ne peut plus clair", de l'occupation du BET par les Français (réplique du Tchad, annexes 39 et 40).

En somme, Monsieur le Président, les données historiques, quelles que soient leurs sources, confirment que déjà en 1919 l'emprise française remplissait la condition requise par le droit international, concernant l'effectivité de la *possessio corpore*.

A ce propos, permettez-moi de citer ce qu'écrivait dans son livre en 1934, sur l'effectivité de l'occupation d'un droit international, le jeune et déjà réputé juriste Roberto Ago. Au sujet du caractère variable, selon le type de territoire, de la *possessio corpore* il observait ceci : en Afrique,

> "ce qu'il apparaît surtout essentiel [pour l'acquisition d'un titre souverain] c'est l'établissement d'une autorité suffisante à faire respecter par les populations indigènes les droits acquis [par les colonisateurs] et à assurer le développement du commerce et du transit" (R. Ago, *Il requisito dell effettività dell'occupazione in diritto*, Roma, 1934, p. 109 : "appare soprattutto essenziale lo stabilimento di un'autorità sufficiente a far rispettare dalle popolazioni indigene i diritti acquisiti e ad assicurare lo sviluppo del commercio e del transito").

2) Monsieur le Président.la partie adverse évoque également le fait que les forces armées françaises étaient en nombre réduit — c'est la deuxième objection de nos contradicteurs. Ils soulignent notamment qu'en 1930, au Tibesti, la garnison française ne comptait que cent quatre-vingt-dix militaires.

La critique libyenne n'est pas exempte de contradictions. En effet, d'*un côté* on nous dit que les militaires n'étaient pas assez nombreux pour maintenir un contrôle effectif (CR 93/19, p. 73), mais de *l'autre*, qu'ils étaient trop nombreux pour que l'on puisse parler d'occupation "paisible" (ibid., p. 78). De même, l'arrivée au BET d'une poignée de gendarmes du Fezzan nous est présentée avec beaucoup d'aplomb comme une incontestable manifestation de la souveraineté ottomane (CR

93/20, p. 22-23), alors que, sans souci du contraste, des décennies d'emprise effective de la France dans la même région sont balayées du revers de la main ! Il me semble qu'a tout le moins nos honorables contradicteurs pourraient-ils utiliser des critères identiques pour mesurer les effectivités, qu'elles soient françaises ou turques.

En vérité, Monsieur le Président, la nature désertique de la région n'exigeait pas la présence d'une armée aussi nombreuse que celle qui serait nécessaire pour occuper, que sais-je, des régions densément peuplées comme la Belgique ou les Pays-Bas. Les Français concentrèrent leurs troupes dans quatre oasis (Aiz, Diado-Kaowar, Faya-Largeau et Fada). Ces quatre oasis sont devenues le siège principal de l'appareil étatique de la France. C'est au départ de chacune des ces oasis que l'autorité française rayonnait sur les régions avoisinantes. De plus, la France a établi des postes et des détachements militaires aux points névralgiques de chaque route caravanière, de manière à pouvoir contrôler le passage par ces routes.

3) Monsieur le Président, nos honorables contradicteurs font également valoir — et c'est leur troisième objection — que la France n'aurait pas eu l'intention d'occuper le territoire, l'*animus possidendi* requis pour acquérir un titre sur un territoire non soumis à un Etat souverain. Sa seule motivation — de la France — aurait été celle de défendre militairement le "Tchad utile" (CR 93/19, p. 70-73).

Deux remarques à ce propos, Monsieur le Président.

Tout d'abord, l'expression "Tchad utile" n'est apparue que vers la fin des années vingt, avec l'introduction du coton au sud du Tchad. La France occupait déjà le BET *depuis une quinzaine d'années* ! C'est dire, Monsieur le Président, que les explications libyennes sont quelque peu contraires au sens de l'histoire. En réalité, si la France a occupé le BET, c'est parce qu'elle entendait s'emparer d'une zone stratégiquement importante à la fois pour protéger le Kanem et le Ouadaï contre d'éventuelles agressions, et pour contrôler les routes caravanières vers le nord.

Ma deuxième remarque porte plus directement sur l'*animus possidendi*. Monsieur le Président, comment peut-on affirmer que les Français n'avaient pas l'intention d'occuper le BET pour y exercer des attributs souverains, alors que dès 1911, dans une note aux autorités

ottomanes, le colonel Largeau tenait à proclamer que l'Ennedi, entre autres, "appartenait" à la France et que dès lors, "quiconque pénétrera dans ces régions sera traité en ennemi" (mémoire du Tchad, annexe 83). D'autres documents français, par exemple une note du ministère des colonies de 1913, font état de la manière la plus nette, de l'intention d'occuper le BET pour y rester et y exercer des pouvoirs souverains (mémoire du Tchad, annexe 87).

Au demeurant, quelle meilleure preuve de l'*animus possidendi* que la promulgation d'actes législatifs ? Qu'il me soit permis à ce propos de rappeler la promulgation, par la France, le 5 octobre 1910 et le 31 juillet 1912, de décrets, "déterminant les circonscriptions administratives du Borkou-Ennedi" (mémoire du Tchad, annexe 116). Je rappellerai aussi la promulgation, le 12 avril 1916, d'un décret en vertu duquel le territoire du Tchad cessait de dépendre de la colonie d'Oubangui-Chari, de même que la décision, du 1er janvier 1921, d'ériger le Tchad en colonie ayant à sa tête un lieutenant-gouverneur (*Exhibit* LC-M13, p. 483). Comment ignorer enfin, l'adoption en 1930, d'un arrêté relatif au rattachement du Tibesti à l'AEF (mémoire du Tchad, annexe 116).

4) Monsieur le Président, la quatrième objection de nos contradicteurs tient à la prétendue *prépondérance* des aspects militaires de la présence française. C'est là une grossière déformation de la réalité.

Si la présence française au BET fut d'abord militaire, comme dans toute occupation, elle a rapidement revêtu un *aspect civil*. La réplique libyenne affirme de façon péremptoire que l'on ne trouve pas trace d'une administration effective du territoire avant les années cinquante (réplique de la Libye, p. 232). Monsieur le Président, sans doute eût-il fallu, pour que nos honorables contradicteurs daignent reconnaître un semblant d'effectivité à la présence française, que la France installât une administration pléthorique au milieu du désert, ou qu'elle y encourageât l'installation de milliers de colons ? Il est évident, Monsieur le Président, qu'à ce niveau aussi, la présence française doit être analysée à la lumière de ce que j'ai dit tout à l'heure au sujet du caractère inhospitalier et désertique de la région.

5. Comment s'étonner, dans ces conditions, que dans un premier temps, diverses fonctions civiles furent exercées par l'appareil militaire ? Tel était d'ailleurs le cas de la plus grande partie de

l'Afrique équatoriale française. Toutefois, comme le précise l'*Histoire militaire de l'Afrique équatoriale française*, dont la partie adverse a fait un usage abondant, dès 1917 "certaines circonscriptions passèrent à l'administration civile" (contre-mémoire de la Libye, annexe 13, p. 483).

Dans les années qui ont suivi l'installation française, le BET fut érigé en circonscription civile, placée sous l'autorité du chef du bataillon qui y était stationné. Trois capitaines dirigeaient les subdivisions du Tibesti, du Borkou et de l'Ennedi. Ces officiers assuraient des fonctions aussi diverses que le recensement des habitants et du bétail, le recouvrement de l'impôt et l'exercice de la justice.

Ce "dédoublement fonctionnel" était d'ailleurs reflété dans les contrôles exercés sur chacune de ces activités. Si les officiers français relevaient de la hiérarchie militaire pour leurs fonctions militaires, c'est au gouverneur qu'ils devaient rendre compte de leurs tâches administratives. De même, les dépenses de l'administration étaient-elles supportées par le budget local, tandis que les dépenses militaires incombaient au budget de l'Etat.

6. A partir de 1930, toutefois, les aspects civils et administratifs vont acquérir une importance grandissante.

7. Quelles furent, dans le domaine civil, les manifestations principales de l'emprise souveraine de la France sur le terrain ? Les tâches principales de l'administration française ont été, bien sûr, les mêmes que celles qu'elle remplissait avant 1930. A ce noyau de base vinrent s'ajouter des activités comme l'organisation de l'enseignement, la gestion de prisons civiles ou l'organisation d'élections. Toutes ces activités témoignent bel et bien d'un développement du contrôle étatique, semblable à celui qu'évoquait Max Huber dans sa sentence sur l'*Ile de Palmas* (RGDIP, 1935, p. 198).

6. La portée juridique de l'occupation française

8. Monsieur le Président, Messieurs de la Cour, en conclusion de cet exposé sur les effectivités françaises au BET, permettez-moi de mettre en exergue *les conséquences juridiques principales* de l'occupation effective du BET par la France.

Ces conséquences sont de deux ordres.

En premier lieu, les effectivités françaises vont modifier la portée juridique du tracé résultant des accords de 1898 et 1902. De la détermination de zones d'influence dont il était question dans l'interprétation initiale, on va progressivement passer à une interprétation qui voit dans ces accords une véritable délimitation de *frontières*. L'évolution est perceptible chez toutes les parties intéressées. La convention franco-britannique de 1919 parle exclusivement de "frontières". De façon plus inattendue, même l'Italie, dans ses protestations contre la convention de 1919, lui sera grief de modifier "les frontières établies par la déclaration du 21 mars 1899" (note de l'ambassade d'Italie à Paris au ministère français des affaires étrangères, en date du 19 décembre 1921, mémoire de la Libye, "Annexe : Archives italiennes", p. 34).

Au demeurant, ce processus de transformation des limites d'une sphère d'influence en frontière d'une possession coloniale constitue un phénomène répandu dans l'histoire du colonialisme. Il est établi que de nombreuses frontières africaines ont épousé le tracé des limites des sphères d'influence que s'étaient arrogées les puissances coloniales à mesure que les zones en question faisaient l'objet d'une occupation effective.

9. Monsieur le Président, j'en viens à la *deuxième conséquence juridique* de l'occupation française. Cette occupation a constitué un élément décisif pour la création d'un titre juridique *coutumier*.

En effet, en vertu du droit coutumier de l'époque, la possession paisible et continue d'un territoire, lorsqu'elle est assortie d'un élément intentionnel, contribue à la formation d'un titre juridique de souveraineté. Les effectivités françaises ont ainsi conféré à la France un *titre juridique non conventionnel*, distinct du précédent, sur le BET.

Charles De Visscher — aux travaux duquel la Libye s'est amplement référée — a mis en évidence les conditions dans lesquelles peut intervenir ce processus de *consolidation* de souveraineté. Il faut tout d'abord que les actes d'autorité de l'occupant puissent être interprétés comme des manifestations d'autorité souveraine : nous avons vu que *tel* était bien le cas. Il faut ensuite tenir compte de l'*attitude des Etats tiers* : c'est leur tolérance qui détermine l'opposabilité du titre *erga omnes* (Les effectivités du droit international public, Paris, Pedone, 1967, p. 103-104).

Or, en l'espèce, la Grande-Bretagne a confirmé par les accords de 1919 et de 1924, sa reconnaissance du droit de la France de s'implanter dans la région. La Turquie, chassée de Tripolitaine en 1912, avait abandonné toute prétention sur le BET au moment où cette zone fut occupée par les Français.

Seule l'Italie a adopté une position plus contrastée. Cette attitude de l'Italie appelle donc un examen attentif. C'est précisément la tâche à laquelle je vais m'atteler.

II. LA RECONNAISSANCE DES EFFECTIVITES FRANÇAISES PAR LES ITALIENS

1) Les différentes thèses italiennes

10. Monsieur le Président, Messieurs de la Cour,

Si on examine l'attitude de l'Italie par rapport aux effectivités françaises dans la région, il apparaît clairement que cet Etat (l'Italie) a adopté, sur un laps de temps relativement court, des positions changeantes, mais qui, dans tous les cas, constituent autant de reconnaissances des effectivités françaises. Ces positions sont au nombre de trois :

Tout d'abord, entre 1921 et 1934, l'Italie a contesté la convention franco-anglaise de 1919, en soutenant qu'elle ne lui était pas opposable pour ce qui est de la frontière qu'elle établissait au sud de la Libye.

Par la suite, à partir de 1930, l'Italie proteste, à deux reprises, contre l'occupation française au BET.

Enfin, tout au long de cette période, l'Italie va continuer à réclamer les compensations prévues par le traité de Londres, revendiquant notamment des cessions territoriales au sud de la Libye.

11. Monsieur le Président, comme j'ai déjà eu l'occasion, hier, de m'étendre sur le traité de Londres, je vais aborder aujourd'hui seulement la première et la deuxième thèses italiennes pour voir quelle était leur valeur juridique.

Par sa première thèse, l'Italie conteste la convention franco-anglaise de 1919, en soutenant qu'elle établit une frontière différente de celle qui avait été définie en 1900 et 1902. Les différentes notes diplomatiques italiennes (datées du 20 octobre 1921, 12 décembre 1921, 27 mars 1924, et du 1er juillet 1932) se présentent comme des protestations contre une *res inter alios acta*, un traité entre

deux autres Etats. L'Italie y avançait l'idée que la frontière établie par la convention de 1919 ne lui était pas opposable. Or, Monsieur le Président, ces notes italiennes pourraient éventuellement revêtir une certaine importance pour ce qui est de l'interprétation, par l'Italie, de la convention de 1919. En revanche, les notes en question n'ont *aucune importance* pour ce qui est du *titre territorial* que la France avait acquis par son occupation effective du BET. Les notes ne soufflent mot de ce titre; elles ne sont donc pas en mesure de l'affaiblir.

La protestation italienne du 27 mars 1924 relève même explicitement que la convention de 1919 intervenait "après l'exploitation et l'occupation [par la France] des nouveaux territoires autant du côté de l'Angleterre que de celui de la France" (mémoire du Tchad, annexe 104), ce qui prouve que le Gouvernement de Rome était conscient de ce que ces zones étaient sous contrôle effectif de la France.

12. Monsieur le Président, on peut faire un raisonnement semblable en ce qui concerne la *deuxième thèse italienne*. Dans les notes de 1930 et de 1934, l'Italie protestait contre l'occupation du BET par la France.

A cet égard, permettez-moi de faire deux constatations.

Tout d'abord, l'Italie ne contestait pas l'effectivité de la présence française au BET. Bien au contraire, c'est cette présence qui est à l'origine des protestations de l'Italie. Une note du ministère des colonies italien en date du 11 décembre 1931 l'indique expressément :

> "De l'avis de ce ministère, ce n'était pas tellement la création de la garnison à Afafi qui devrait être l'objet d'une protestation, mais plutôt la progressive occupation militaire et l'organisation administrative de tout le Tibesti." (Mémoire du Tchad, annexe 132).

Monsieur le Président, il est donc évident que les autorités italiennes étaient bien conscientes de l'emprise française sur le Tibesti.

Cela mérite d'être souligné, dans la mesure où la partie adverse s'évertue à prétendre qu'il n'y a pas eu d'occupation effective du BET avant 1950.

De plus, quelle qu'ait pu être la valeur juridique des contestations italiennes, elles ne portaient que sur le titre *conventionnel* de 1919, et ne pouvaient dons pas affecter le titre *coutumier* de la

France. Vous voyez donc, Monsieur le Président, que les deux thèses italiennes dont je viens de parler se rejoignent et se recoupent. Toutes deux finissent par admettre l'effectivité de l'emprise française dans la zone dont il s'agit.

2. L'affaire du petit atlas scolaire (1934)

13. C'est dans ce contexte, Monsieur le Président, qu'il faut placer l'épisode du petit atlas scolaire italien. Tombée sur une série, d'ailleurs incomplète, de documents concernant cette affaire, la Partie adverse a sonné le tocsin pour gonfler l'importance de cet épisode — vraiment mineur — et en magnifier la cause libyenne. En réalité, Monsieur le Président, un examen attentif montre que cette affaire ne peut pas apporter d'eau au moulin de la Libye et remettre en cause notre thèse.

L'affaire a trait à un atlas scolaire utilisé par les écoles primaires italiennes en 1930 et dans lequel le Tibesti était représenté parmi les possessions italiennes de Libye. Notant que, de cette manière, l'atlas tendait à faire croire que la région en question était comprise dans la zone italienne, l'ambassade française demanda que l'on y apportât une "rectification". Les autorités italiennes convinrent que la meilleure solution était de rectifier la carte en laissant en blanc la zone visée par ;la note française. Cette solution était dictée par l'opportunité de ne pas prendre en position sur une contrée "au sujet de laquelle la souveraineté n'était encore définie" (ce sont les mots des Italiens).

20. Monsieur le Président, trop de zones d'ombres subsistent pour que cet épisode puisse être utile. En effet, on ignore absolument si les instructions du ministre des affaires étrangères italien furent effectivement exécutées par le ministre de l'éducation. On ne sait rien non plus de la *réaction française* : le Quai d'Orsay accepta-t-il la solution italienne, ou réagit-il par une autre protestation ?

On ignore tout cela, faute de documents. Et pourtant nos éminents contradicteurs, faisant preuve d'une fertile imagination poétique, prétendent que "la solution a dû paraître agréable à la France, puisqu'il ne résulte pas qu'il y ait eu de nouvelles protestations". Ils en déduisent, par un triple saut périlleux, ceci : "la France n'avait aucune objection à soulever contre les cartes indiquant l'absence de la frontière" (CR 93/17, p. 53). Monsieur le Président, on ne peut qu'admirer la capacité de nos contradicteurs de substituer leurs désirs à la réalité historique.

Quand à l'attitude italienne, même à supposer qu'en elle-même elle puisse avoir une

importance quelconque, quelle conclusion pourrait-on en tirer ?

Peu de chose, à vrai dire. Une simple confirmation, somme toute banale, de ce que d'autres documents diplomatiques nous avaient déjà appris, à savoir que tandis que la France affirmait tranquillement sa souveraineté sur le BET, l'Italie faisait valoir que la frontière méridionale de la Libye n'avait pas encore été *définie d'un commun accord*. Le but de l'Italie était clair : contester les titres *conventionnels* français dans l'espoir de se voir céder des portions de territoires aussi larges que possible en application de l'article 13 du traité de Londres. Tel était en effet l'objectif de l'Italie depuis plusieurs années.

3. Le traité Laval-Mussolini de 1935

J'en arrive ainsi, Monsieur le Président, au traité Laval-Mussolini de 1935.

Monsieur le Président, ce traité Laval-Mussolini de 1935 n'est pas le plat de résistance des thèses tchadiennes : notre plat de résistance est le traité franco-libyen de 1955. Il n'en demeure pas moins que le traité Laval-Mussolini est le dessert, un dessert succulent pour les juristes. Vous m'excuserez pour ces métaphores culinaires, Monsieur le Président, d'autant plus que nous approchons de l'heure du déjeuner. Toujours est-il que le traité de 1935 constitue à l'évidence une des pommes de discorde les plus indigestes entre le Tchad et la Libye. Les deux Parties sont d'accord seulement sur un fait simple et élémentaire, à savoir que le traité n'est jamais entré en vigueur. Pour le reste, nous sommes aux antipodes. Pour clarifier les choses, je suis contraint de m'arrêter assez longuement sur ce traité, et je vous demande d'ores et déjà de m'en excuser, Monsieur le Président.

Le traité Laval-Mussolini revêt une importance capitale pour la reconnaissance italienne des effectivités françaises.

14. Monsieur le Président, ce traité était un traité de *cession* de territoire français à l'Italie. Conclure avec la France un traité par lequel cette dernière lui cédait une partie de la région n'avait de sens — historiquement et juridiquement — que si l'Italie admettait que les territoires en question se trouvaient auparavant sous la souveraineté française. Les accords Laval-Mussolini constituent donc une reconnaissance *publique* des droits souverains de la France sur le BET.

15. Avant de commencer mon analyse du traité, je voudrais appeler votre attention sur une question de méthode qui me paraît importante. En discutant le traité Laval-Mussolini, tout comme les autres épisodes successifs, nos collègues de l'autre côté de la barre ont constamment adopté une approche biaisée : ils ont mis en relief les documents favorables à leur thèse, tout en ignorant ou en minimisant ceux qui ne l'étaient pas. C'est de bonne guerre et je comprends bien la valeur tactique de cette approche.

Cependant, je ne suivrai pas nos honorables contradicteurs sur cette route. La réalité en général, nous le savons bien, et la réalité juridique en particulier, est toujours complexe, parfois contradictoire. A mon sens, notre tâche est d'offrir à la Cour un *tableau général*, mais aussi un tableau aussi *complet* que possible, des différents facteurs, quelle que puisse être leur incohérence apparente, pour ensuite établir quel est l'élément *déterminant*. C'est ce que je m'efforcerai de faire, Monsieur le Président.

16. Commençons par le *texte* du traité. Il s'agit des articles 2 et 4, que vous trouvez dans votre dossier d'audience au numéro 1. Nos honorables contradicteurs ont souligné qu'il existe une différence entre le libellé de l'article 2, relatif à la Libye, et celui de l'article 4, relatif à l'Erythrée. L'article 2 dispose entre autres que "la frontière séparant la Libye de l'Afrique occidentale française et de l'Afrique équatoriale française [...] sera *déterminée* ainsi qu'il suit...", tandis que l'article 4 concernant l'Erythrée, stipule, entre autres, que "Le tracé suivant sera *substitué* à la délimitation établie..." (Les italiques sont de nous.)

Monsieur le Président, la différence de terminologie est indéniable. Mais peut-on pour autant en déduire que le traité de 1935 a délimité pour la première fois la frontière méridionale de la Libye ? Cette conclusion ne saurait se justifier. En effet l'article 2, en indiquant le tracé de la frontière au nord du Tibesti, précise à deux reprises que ce tracé est établi "de telle sorte que [certaines zones] *restent* en territoire français" (les italiques sont de nous). Ce faisant, le traité présuppose qu'il existait bel et bien une frontière entre les deux pays, frontière que l'accord a précisément pour objet de déplacer, afin de transférer à l'Italie des régions qui se trouvaient sous souveraineté française.

Quelle conclusion faut-il en tirer ? Que le texte des dispositions pertinentes du traité ne

permet pas une *interprétation univoque*. En effet, certains mots de l'article 2 amènent à conclure que cet article délimite la frontière méridionale de la Libye. Tandis que d'autres mots de la même disposition justifient la conclusion que l'article 2 rectifie la frontière dont il s'agit.

17. D'après les règles de la convention de Vienne sur le droit des traités, nous devons donc avoir recours au *contexte* du traité et à la *pratique subséquente* des parties. Pour ce qui est du contexte, il faut exclure que le *communiqué* de presse conjoint, publié au lendemain de la signature du traité, puisse être considéré comme un accord ultérieur ou une interprétation authentique. J'en expliquerai les raisons tout à l'heure. Reste donc la conduite subséquente des parties. Mais, avec votre permission, Monsieur le Président, et seulement pour des raisons de clarté de mon exposé, je l'examinerai après avoir utilisé un *moyen complémentaire d'interprétation*, à savoir les *travaux préparatoires*, sur lesquels la Partie libyenne a beaucoup misé, et qui méritent donc un moment d'attention.

Voyons donc les travaux préparatoires. Messieurs de la Cour, si vous examinez les nombreux documents produits ou cités de part et d'autre, force est de constater que tant du côté français que du côté italien, les négociateurs du traité de 1935 étaient d'accord pour considérer qu'ils allaient procéder à une *rectification de la frontière méridionale de la Libye*. Par négociateurs j'entends l'ambassadeur français à Rome, Chambrun, et le sous-secrétaire italien aux affaires étrangères, Suvich, ainsi bien sûr, que Laval et Mussolini. Et bien, Monsieur le Président, les documents pertinents prouvent sans l'ombre d'un doute que Laval parla toujours de *renonciation* de la France à une partie de son territoire (télégramme de Laval du 5 décembre 1934 à Chambrun, *Documents diplomatiques français 1932-1939*, 1ère série, 1932-35, tome VIII, p. 300), ou de "*concessions territoriales*" (télégramme de Chambrun du 7 janvier 1935, mémoire de la Libye, "Annexe : Archives françaises", p. 422). Mussolini, à son tour, insista, le 1er janvier 1935, pour "l'inclusion, dans la *zone cédée* à l'Italie sur la frontière de la Libye", de quelques postes habités (ibid., p. 546) et le 7 janvier, à la veille de la signature des accords, il [Mussolini] nota que "la valeur économique des territoires compris dans la *rectification de la frontière libyenne* était pratiquement nulle" (mémoire de la Libye, "Annexe : Archives françaises", p. 422).

L'idée d'une rectification de territoire fut avancée avec une insistance particulière et à maintes reprises par les Français. Par exemple on y insiste beaucoup dans un avant-projet de note pour le ministre des affaires étrangères, de 1934 (mémoire de la Libye, "Annexe : Archives françaises", p. 400-403) et l'ambassadeur Chambrun, dans son télégramme du 1er janvier 1935, utilise une phrase très éloquente : il parle de "*deux rectifications de frontière le long de la Libye et de l'Erythrée*" (ibid., p. 431). Donc, l'ambassadeur français ne fait aucune distinction entre la Libye et l'Erythrée, pour ce qui est de leurs frontières. Monsieur le Président, ce fut la France qui rédigea les articles 2 et 4. Ce fut elle qui donc utilisa, la première, le mot "détermination"dans l'article 2, et le mot "substitution" dans l'article 4. Or, Monsieur le Président, je viens de montrer que la France ne faisait pas de distinction pour ce qui était de la frontière libyenne et celle de l'Erythrée. Dès lors, comment imaginer que la France ait voulu attribuer une signification et une portée différentes aux termes "détermination" et "substitution" ? En réalité, dans les deux cas la France visait une *rectification*. Cela confirme donc l'interprétation de l'article 2 avancée par le Tchad.

Monsieur le Président, permettez-moi, de souligner que jusqu'à présent j'ai parlé de véritables *travaux préparatoires*, à savoir des prises de position ou propositions et contre-propositions des *principaux négociateurs*. En revanche, l'on ne peut pas considérer comme faisant partie de ces travaux préparatoires la note non signée d'un bureau du Quai d'Orsay, note du 1er janvier 1935, dont nos contradicteurs font grand étalage, car on y affirme que le traité ne prévoyait pas une cession de territoire (mémoire de la Libye, par. 5.324). Mais à l'évidence, cette note, dont on ne connaît ni l'auteur ni le destinataire, appartient à la catégorie des "notes internes" dont la "valeur probante sur le plan international est relative", comme nous l'a à juste titre rappelé notre savant collègue de l'autre côté de la barre, le professeur Cahier (CR 93/17, p. 33). On ne peut donc pas la mettre sur le même pied que les déclarations et propositions des négociateurs.

Monsieur le Président, mon éminent collègue et très cher ami Condorelli a remarqué à juste titre (CR 93/17, p. 68) qu'il faut tenir compte aussi de ce que l'on pourrait appeler, avec la sentence arbitrale rendue dans l'affaire de la *Guinée-Guinée Bissau*, les "travaux préparatoires au sens large", à savoir les prises de position des deux gouvernements devant leurs parlements respectifs. Et j'y

ajouterai le "communiqué de presse" conjoint.

18. Cependant, au lieu de prendre en compte *tous les travaux préparatoires* au sens large dans leur *totalité*, nos contradicteurs montent en épingle deux éléments seulement, qui d'après eux apportent de l'eau à leur moulin : il s'agit du "communiqué de presse" franco-italien et de l' "exposé des motifs" soumis par le Gouvernement français à la Chambre des députés.

Examinons ensembles ces documents, Messieurs de la Cour.

19. Et commençons par le *communiqué de presse*, auquel la Libye attache — sûrement à tort — tant d'importance (vous le trouverez dans votre dossier d'audience, au numéro 2).

N'oublions pas, Monsieur le Président, qu'en réalité ce *communiqué de presse* fut rédigé comme un *acte politique*, un acte à l'*intention du grand public*, sans trop de souci pour la rigueur juridique. Il s'ensuit que sa valeur aux fins de l'interprétation du traité est minime.

Je note d'emblée qu'une lecture attentive permet de déceler les nombreuses ambiguïtés de ce communiqué.

On y lit tout d'abord que le traité "*délimite* les frontières entre la Libye et les colonies françaises limitrophes, et entre l'Erythrée et la côte française des Somalis". A première vue, le communiqué n'opère donc aucune distinction entre les deux frontières : dans les deux cas, il affirme qu'il y a eu *délimitation*, selon le traité dont il s'agit. Or, la Libye reconnaît à tout le moins que la frontière de l'Erythrée était *rectifiée* par le traité. Dès lors, comment la Libye peut-elle expliquer cette incohérence du communiqué de presse ? En effet, la Libye ne peut pas accepter le terme "délimitation" pour la frontière libyenne et le refuser pour la frontière de l'Erythrée. Le communiqué de presse poursuit en indiquant que cette délimitation intervenait "en application de l'article 13 du pacte de Londres, qui donnait droit à l'Italie à des compensations coloniales consistant en des *rectifications* de frontières".

Cette phrase que je viens de citer montre bien une chose frappante : pour les auteurs du communiqué de presse, le traité Laval-Mussolini, en mettant en œuvre le pacte de Londres, n'envisageait que des "rectifications de frontières". Mais cela serait en contradiction flagrante avec le terme "délimitation" dont j'ai parlé tout à l'heure. *La vérité est*, Monsieur le Président, que les

auteurs du communiqué de presse utilisent les termes "délimitation" et "rectification" comme synonymes. Cela ne devrait pas surprendre, du fait que, comme je l'ai dit tout à l'heure, le communiqué de presse fut conçu comme un *acte politique*, destiné à *l'opinion publique*.

On peut donc écarter la thèse libyenne qui martèle le fait que le communiqué de presse opère ensuite une distinction entre la frontière libyenne, qui a été "déterminée" et celle de l'Erythrée, qui a été "rectifiée". Là encore, à l'évidence, le communiqué de presse utilise ces termes indifféremment ou d'une manière non technique.

20. Monsieur le Président, j'en viens maintenant aux *débats parlementaires* en France et Italie. Je commencerai par l'exposé des motifs accompagnant le projet de loi soumis à la Chambre des députés française, auquel la Libye attache tant d'importance (contre-mémoire du Tchad, livre III, annexe 75). Lisons ensemble ce document, mais en entier; c'est la seule façon de savoir s'il mérite l'importance que lui accordent nos contradicteurs.

L'introduction de l'exposé des motifs affirme que "L'économie générale du traité peut se résumer en quelques mots" : les deux puissances ont abouti à une "*fixation* des frontières entre leurs possessions africaines limitrophes". Voilà donc un premier élément : l'exposé des motifs ne fait pas de distinction entre les deux frontières africaines; il place la fixation des deux frontières sur le même plan. Ce qui, à mon avis, correspond tout à fait à ce qui se passa réellement.

Mais venons-en au passage sur lequel nos contradicteurs ont bâti leur argumentation. Ce passage affirme que l'Italie ne se considérait pas liée par les conventions de 1899 et 1919, et estimait qu'il n'existait aucune *frontière conventionnelle* au sud de la Libye. Certes, cette affirmation semble favorable à la thèse libyenne, car elle souligne que l'Italie ne reconnaissait aucune frontière conventionnelle au sud de la Libye. Est-ce dire donc que l'exposé des motifs s'est limité à entériner la version italienne ? *Pas du tout !* Tout d'abord, il reflète d'une manière erronée cette version italienne, car il ignore que l'Italie a toujours reconnu, par l'accord de 1902 (confirmé en 1912), la ligne de 1899. Ensuite, l'exposé des motifs contient un passage qui carrément contredit la thèse libyenne. Lisons ensemble, Messieurs de la Cour, ce passage que la Libye s'est bien gardée de citer.

A propos de l'article 2 du traité, l'"exposé des motifs" dit ceci :

"La ligne définie par le traité du 7 janvier [le traité Laval-Mussolini]

> représente ... un abandon de 114 000 kilomètres carrés. Elle *remet* à l'Italie les contreforts nord du Tibesti peuplés par des tribus qui sont plutôt en relations avec Koufra et le Fezzan qu'avec l'Afrique équatoriale française. Elle *laisse en notre possession* toutes les tribus qui nomadisent régulièrement vers le sud, les sommets culminants du massif, les grandes voies de communication..." (Les italiques sont de moi.)

Toutes les expressions que j'ai soulignées indiquent que la bande d'Aouzou, jusqu'alors soumise à l'emprise souveraine de la France, allait être *cédée* à l'Italie. Parler de *cession* implique que l'on transfère un territoire; ce qui suppose que ce territoire soit déterminé dans l'espace. Force est de conclure, Monsieur le Président, que l'exposé des motifs est un texte ambigu et contradictoire.

21. Monsieur le Président,

Si je me suis appesanti sur cet *exposé des motifs*, cela ne tient pas à son importance intrinsèque, mais simplement au fait que nos contradicteurs ont voulu en faire grand étalage. Or, je viens de montrer qu'il n'est pas susceptible d'interprétation univoque. Qui plus est, si l'on examine tous les *autres documents parlementaires pertinents*, l'on ne peut échapper à la conclusion que la thèse de la *cession* de la bande d'Aouzou à l'Italie est admise d'un commun accord par la France et l'Italie. Examinons donc, même si c'est très rapidement, tous ces documents parlementaires que la Partie adverse a préféré ignorer, et pour cause !

Pour ce qui est de la *France*, il suffit de rappeler que, dans leurs différentes interventions, tant le rapporteur de la commission des affaires étrangères de l'Assemblée nationale que son homologue du Sénat ont mis l'accent sur la cession de territoires, tout en s'efforçant d'en minimiser la portée (contre-mémoire du Tchad, p. 378-380). Dans sa réponse à la Chambre, Laval évoqua de façon grandiloquente "un sacrifice de 114 000 kilomètres carrés, *cédés* à l'Italie" (contre-mémoire du Tchad, annexe 78, p. 1208; les italiques sont de nous). Dans cette même réponse, M. Laval répéta *trois fois*, je dis *trois* fois, l'expression "rectification de frontière" au sujet de la frontière méridionale de la Libye (contre-mémoire du Tchad, annexe 78) et insista plusieurs fois sur le fait que la France avait fait une *cession* territoriale à l'Italie.

Pour ce qui est de l'*Italie*, il suffit de rappeler que tant devant le Grand Conseil du Fascisme qu'à la Chambre des députés et au Sénat, Mussolini parla en termes clairs et explicites d'une *cession*

de 114 000 kilomètres carrés par la France à l'Italie (contre-mémoire du Tchad, annexes 82, 79 et 81).

A l'évidence, Messieurs de la Cour, les deux protagonistes de l'affaire, Laval et Mussolini, étaient d'accord pour dire que par le traité de 1935 la France avait *transféré* une partie de son territoire colonial à l'Italie.

22. J'en viens maintenant à l'*attitude subséquente des deux Parties*. Elle nous offre une confirmation éclatante de notre thèse.

En effet, tous les documents pertinents, tant français qu'italiens, sont concordants et dépourvus d'ambiguïté : tous parlent de "cession territoriale" à propos de la bande d'Aouzou.

Commençons par l'*Italie*. Je me bornerai à rappeler deux dépêches du ministère des affaires étrangères, toutes deux de 1937, où l'on parle de "l'occupation des territoires coloniaux qui nous ont été *cédés* par le traité" (mémoire du Tchad, annexes 170 et 189). Je rappellerai aussi deux mémorandums rédigés en 1937 par le ministère italien des affaires étrangères, où l'on soulève le problème de la "remise des territoires *cédés*" à l'Italie en vertu du traité (mémoire du Tchad, annexes 170 et 190; les italiques sont de nous).

Je passe à la pratique *française*. A cet égard, il convient de mentionner tout d'abord deux notes du ministre des affaires étrangères français, Laval, au ministre des colonies, l'une du 9 avril 1935 (mémoire du Tchad, annexe 154), et l'autre du 3 juin 1937 (mémoire du Tchad, annexe 174). Dans ces notes, M. Laval parlait de "cessions territoriales". Par la suite deux notes de 1938 de la sous-direction d'Afrique-Levant évoqueront en termes plus précis la "*translation de souveraineté et la remise subséquente des territoires*" prévue par le traité, en employant elles aussi l'expression "cession" de territoires (voir mémoire du Tchad, p. 208-209; les italiques sont de nous). Ici on parle de "*translation de souveraineté et de remise subséquente de territoires*".

23. Voilà pour ce qui est de l'attitude subséquente des deux Parties. Mais permettez-moi, Monsieur le Président, d'appeler votre attention sur une chose frappante. L'idée qu'en 1935 la France acceptait de *céder* une partie du nord du Tchad à l'Italie, cette idée a été énoncée de manière

très nette par la Libye elle-même, et ce en 1955.

En effet, dans la lettre du 4 août 1955 du colonel El-Senoussi Latyough, "Deputy Chief of Staff of the Libyan Army", au sujet du traité de 1935 et avant de rappeler qu'il n'était pas entré en vigueur, il est dit qu'en 1935 "*The French gave from their side a portion of the land to Italy*" (mémoire de la Libye, annexe 74; les italiques sont de nous).

24. Pour conclure sur le traité Laval-Mussolini, nous sommes fondés à dire, Monsieur le Président, que même si le texte du traité peut se prêter à des interprétations divergentes, l'*attitude subséquente* des Parties et les *travaux préparatoires* ne laissent subsister aucun doute quant au fait que ce traité envisageait une *cession* de territoire (la bande d'Aouzou) par la France à l'Italie, ce qui supposait évidemment que ce territoire fût sous l'emprise souveraine de la France.

Que dire, alors, des affirmations de la Partie libyenne, selon lesquelles c'est l'*Italie* qui par le traité de 1935 avait *abandonné* du territoire à la France (CR 93/14, p. 35; CR 93/18, p. 65) ? Sans doute, nos collègues libyens entendent-ils suggérer par là que Mussolini, qui — tout comme la Libye aujourd'hui — aspirait à la moitié du Tchad, avait fini par "céder" cet immense territoire à la France, en se contentant de la bande d'Aouzou. Monsieur le Président, cela me rappelle une histoire : c'est l'histoire d'un commerçant connu pour son avidité et son avarice, mais aussi pour ses talents commerciaux. Un jour, après avoir fait une grosse affaire, il se plaignit : "J'ai perdu 30 millions." Quand un collaborateur lui fit noter qu'il avait tout de même empoché 50 millions, le commerçant répondit : "C'est vrai, mais j'avais décidé auparavant que j'aurais dû gagner 80 millions !"

4. L'incident de Jef-Jef (1938)

25. Monsieur le Président, Messieurs de la Cour,

J'en viens maintenant à l'incident de Jef-Jef, qui confirme de la manière la plus nette que l'Italie reconnaissait que la bande d'Aouzou était sous la souveraineté française.

Avec votre permission, Monsieur le Président, je voudrais m'étendre quelque peu sur cet incident. Nos contradicteurs ont affirmé à trois reprises qu'il est "mineur", voire "très mineur" (CR 93/17, p. 70; CR 93/18, p. 25; CR 93/20, p. 17). Leur insistance est suspecte. Ils ont ajouté

qu'en tout état de cause, l'on ne saurait attacher trop d'importance à un épisode isolé car il faut prendre en compte la conduite des Etats dans son ensemble (CR 93/20, p. 17). En réalité, Monsieur le Président, l'incident de Jef-Jef n'est pas isolé du tout; il s'insère dans un ensemble de comportements constants de la France et de l'Italie. Ensuite, Jef-Jef doit retenir notre attention pour une autre raison : à la différence des autres cas, où l'on a des déclarations ou prises de position adoptées pour ainsi dire *in abstracto* pour proclamer ou pour rejeter des droits en termes généraux, dans l'affaire de Jef-Jef on assiste à un affrontement sur le terrain, à une action concrète considérée par une partie, la France, comme une violation de ses droits. Cet affrontement donne lieu à des prises de position *in concreto*.

Dionisio Anzilotti — un de vos prédécesseurs, Monsieur le Président — affirmait que c'est d'abord et avant tout à l'occasion des incidents qui mettent aux prises les Etats que l'on peut établir l'existence des droits et obligations d'un Etat. La même remarque a été faite depuis à maintes reprises. Qu'il me suffise à ce propos de mentionner l'opinion dissidente du juge Read dans l'affaire des *Pêcheries* (C.I.J. Recueil 1951, p. 191).

En effet, Monsieur le Président, c'est lors d'un conflit, lorsque deux Etats sont à couteaux tirés, qu'ils expriment de la façon la plus nette leurs vues juridiques. L'échange de contestations constitue en quelque sorte le *révéloteur* qui permet d'établir l'existence d'une obligation juridique.

A ce titre, l'incident de Jef-Jef est d'une importance capitale pour notre affaire.

Mais voyons les faits.

Tout commence au début du mois de mars 1938, soit un peu plus de trois ans après la signature du traité Laval-Mussolini. Six "travailleurs indigènes italiens" — c'est une expression utilisée par un document italien — se rendent dans la région de Jef-Jef, au lieu-dit le Rocher noir, où ils commencent à creuser un puits.

La localité en question — vous la voyez sur l'écran — se trouve au beau milieu de la bande d'Aouzou, à 50 kilomètres au sud de la frontière 1899/1919 et à 135 kilomètres au nord de Tekro : en d'autres termes, Monsieur le Président, Jef-Jef se trouve au cœur de la zone qui aurait dû être cédée par la France à l'Italie en vertu traité Laval-Mussolini.

La carte que nous projetons maintenant indique justement cet emplacement et les deux tracés.

26. Quelles sont les réactions à cette incursion italienne à Jef-Jef ? D'après la Partie libyenne, la France protesta, mais malgré ces protestations, l'Italie envoya des militaires qui achevèrent, sans être dérangés, les travaux de forage. Ce récit des faits, Monsieur le Président, est complètement fallacieux. Les nombreux documents, tant italiens que français, que la République du Tchad a produits (voir mémoire du Tchad, p. 211-218 et les documents qui y sont cités, et contre-mémoire du Tchad, annexe 83) montrent, Monsieur le Président, trois choses essentielles.

— *Primo*, les Italiens se rendirent trois fois à Jef-Jef, chaque fois pour de courtes périodes, et chaque fois ils furent immédiatement chassés par les militaires français;

— *secundo*, ils ne purent pas achever leurs travaux de forage d'un puits, précisément parce qu'ils furent expulsés par les Français;

— *tertio*, la France protesta par une note diplomatique vigoureuse et nette contre cette violation de sa souveraineté, tandis que les Italiens ne firent à aucun moment valoir un quelconque titre juridique sur la zone; bien au contraire, en s'inclinant devant la position française, les Italiens reconnurent explicitement que la zone appartenait à la France.

27. Ces faits, à eux seuls, sont éloquents. A l'évidence, les Italiens avaient entendu tester, par un harcèlement obstiné, la capacité et la volonté de réaction de la France. La réponse française fut dépourvue de toute ambiguïté. A chaque fois, la France fit valoir concrètement son autorité souveraine et expulsa les intrus.

Mais, Monsieur le Président, l'affaire ne se limita pas à une simple opération de police. Informé de l'expulsion des ouvriers indigènes italiens de Jef-Jef, le gouverneur de la Libye, Italo Balbo, dont l'expansionnisme colonialiste était bien connu, monta sur ses grands chevaux et proposa à Rome d'envoyer à Paris une note de protestation contre "l'acte de pillage accompli par les officiers français" (mémoire du Tchad, p. 75).

Le 3 mai, l'ambassade d'Italie à Paris fit donc parvenir un aide-mémoire au Quai d'Orsay. Que fait l'Italie ? Affirme-t-elle ses droits sur la zone de Jef-Jef, comme l'avait instamment recommandé Balbo ? Proteste-t-elle contre l'expulsion des ouvriers indigènes italiens par les forces

françaises ?

Rien de tout cela ! Au contraire, l'aide-mémoire italien parle de "l'excavation d'un puits dans la zone comprise entre la *frontière actuelle* de la Libye et *la frontière résultant des accords Mussolini-Laval de 1935*" (mémoire du Tchad, annexe 199; les italiques sont de moi). "Frontière actuelle de la Libye" !

Ainsi Messieurs de la Cour, l'Italie admet en toutes lettres et sans hésitation deux choses capitales : *primo*, que Jef-Jef se trouve en territoire français; *secundo*, qu'au moment de l'incident, la frontière entre le Tchad et la Libye était celle de 1899/1919.

Ensuite, l'aide-mémoire italien annonce que "le gouvernement général de la Libye a estimé nécessaire" de procéder à la reprise des travaux en question. Encore une fois, comment l'Italie justifie-t-elle cette décision ? Invoque-t-elle ses droits souverains sur la région ? Pas du tout. L'Italie fait valoir l'utilité pour tous — pour les habitants de la zone de même que pour les Français — de l'entreprise, et donc son caractère éminemment pacifique : ces travaux [je cite la note italienne] "sont rendus nécessaires pour l'approvisionnement d'[sic]eau des populations qui demeurent dans cette zone" et ont donc "un caractère pacifique, dont on ressent la nécessité en vue aussi de faciliter le commerce des caravanes entre la zone de Cufra et l'Afrique équatoriale française (ibid.).

En d'autres termes, les Italiens acceptent tous les arguments juridiques de la France, ils s'abstiennent de protester contre les mesures énergiques des militaires français et s'efforcent de justifier leur action par une référence à l'intérêt commun.

28. Cette tentative de justification italienne provoque une réaction nette et indignée de la France. Le Quay d'Orsay répond par une note du 20 juin, une note dans laquelle il réaffirme la souveraineté française, et rejette toute tentative qui viserait à entreprendre quoi que ce soit dans cette zone sans l'autorisation de la France.

Je me permets, Monsieur le Président, de vous lire le passage principal de cette note, car il énonce, avec une grande clarté , les enjeux juridiques en question :

> "Le ministère [français des affaires étrangères] croit ... devoir rappeler à l'ambassade [italienne] que la région en cause continuera à relever de la souveraineté française jusqu'à ce que, les ratifications [du traité de 1935] ayant été échangées, ledit

traité soit entré en vigueur. L'autorité française y demeure en attendant munie de toutes les attributions que comporte ce statut juridique et les autorités italiennes voisines ne sauraient donc, même à des fins éminemment louables, y assumer des responsabilités d'aucune sorte." (Mémoire du Tchad, annexe 202.)

Je vous pose la question, Monsieur le Président, Messieurs de la Cour : peut-on désirer une affirmation plus nette, dans les relations internationales, des attributs souverains d'un Etat ?

Ces échanges de notes diplomatiques entre l'Italie et la France montre bien, sans l'ombre d'un doute, que les deux Etats étaient d'accord sur deux éléments essentiels : tout d'abord, tant que le traité Laval-Mussolini n'était pas ratifié, la frontière méridionale de la Libye restait celle de 1899/1919; en deuxième lieu, et par voie de conséquence, la France exerçait des pouvoirs souverains dans le territoire en-deçà de cette frontière.

29. Face à cette prise de position si claire et nette, nos éminents collègues de l'autre côté de la barre affirment que l'Italie, en envoyant ses ouvriers et ensuite ses militaires à Jef-Jef, fit "*acte de souveraineté* dans la zone en effectuant des travaux de génie civil et en laissant des *marques* indiquant que le lieu concerné était en territoire italien" (CR 93/17, p. 71; les italiques sont de nous). Et nos contradicteurs d'ajouter qu'en tout cas "aucun document ne témoigne d'un acquiescement italien à l'attitude de la France" (ibid., p. 72).

On croit rêver, Monsieur le Président ! Cela équivaut à dire que si des militaires, que sais-je, belges, se rendent à Maastricht pour mener des travaux non autorisés et que les autorités néerlandaises les ramènent poliment à la frontière, après quoi elles envoient une protestation diplomatique à Bruxelles, et bien, cette intrusion belge devrait être considérée comme un acte de souveraineté de la Belgique en territoire néerlandais.

En réalité, les soi-disant "randonnées italiennes" à Jef-Jef furent bel et bien des violations de la souveraineté française : la France *protesta* sur le plan diplomatique et éloigna les Italiens de son territoire (poliment, pour ne pas tendre trop les rapports dans une période difficile); l'Italie accusa le coup et s'inclina, montrant son acquiescement à l'attitude française.

Certes, Monsieur le Président, la réaction française ne fut pas immédiate. Cela tient non seulement à la technologie rudimentaire de l'époque, mais surtout à la nature désertique de la zone et

aux distances immenses qui séparaient les différents postes militaires et administratifs. Les mêmes raisons expliquent comment un petit groupe de militaires italiens a pu s'infiltrer une troisième fois en territoire français. Le fait est que le long de la bande d'Aouzou, il n'y avait ni barbelés, ni miradors !

Permettez-moi d'ajouter, Monsieur le Président, que les soi-disant "marques" de souveraineté que — d'après nos éminents contradicteurs — les Italiens auraient laissées à Jef-Jef ne furent pas, comme on aurait pu s'y attendre, le drapeau italien, des armes, des constructions même si provisoires, mais "trois tonneaux ... avec du papier mentionnant BIR BAL BO Royaume italien le 22 avril 1938" (c'était la date de départ des Italiens) (contre-mémoire du Tchad, annexe 83, p. 542). Voilà, Monsieur le Président, les marques importantes de la souveraineté italienne auxquelles font allusion nos contradicteurs : du papier à en-tête.

30. En conclusion, Monsieur le Président, l'incident de Jef-Jef confirme pleinement la souveraineté française sur la bande d'Aouzou. Mais il y a plus. Il confirme aussi que les Italiens avaient accepté la ligne 1899-1919. Cela découle non seulement de l'aide-mémoire italien du 3 mai 1938, que j'ai citée tout à l'heure, mais encore du croquis de la zone que Balbo (notez bien que Balbo était un colonialiste féroce et acharné) a envoyé à Rome à la demande du ministère des affaires étrangères.

Ce croquis, que vous pouvez voir sur le transparent, indiquait seulement deux frontières, celle de 1899-1919 et celle qui était prévue par le traité de 1935. Il confirmait et reconnaissait la thèse française que dans la zone il n'existait que deux lignes : la ligne en vigueur, de 1899-1919, et celle définie par le traité de 1935, qui ne sera jamais appliquée.

Monsieur le Président, je vous remercie de votre patiente attention et si vous le voulez bien, je terminerai ma plaidoirie demain matin.

Merci.

The PRESIDENT : Thank you very much Mr. Cassese. We shall resume, Professor Cassese, tomorrow morning at 10 o'clock.

L'audience est levée à 13 h 5.

CR 93/25

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Wednesday 1 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 1er juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Ranjeva
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajibola
	Herczegh
Judges *ad hoc*	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

Le PRESIDENT : Please be seated. Professor Cassese.

M. CASSESE : Merci, Monsieur le Président.

Monsieur le Président, Messieurs les juges, hier, je me suis efforcé de montrer que, dès 1919, par leur emprise effective sur le Borkou, l'Ennedi et le Tibesti (le BET), les Français ont acquis des droits souverains sur la région. Cela est confirmé par la reconnaissance italienne — expresse ou implicite, telle qu'elle découle entre autres du traité Laval-Mussolini de 1935, et de l'épisode de Jef-Jef de 1938.

Mais, Monsieur le Président, nos honorables contradicteurs prétendent tirer parti d'un autre incident, un incident qui mettra aux prises l'Italie et la France en 1941, à propos de l'application de la convention d'armistice franco-italienne de 1940.

D'après la Partie adverse, cet épisode prouverait qu'à cette époque, l'Italie s'accrochait encore à l'idée qu'il n'y avait pas de frontière au sud de la Libye (réplique de la Libye, par. 6.247).

5. La convention d'armistice franco-italienne de 1940

Voyons donc les faits. Mais pour comprendre les faits et les règles juridiques pertinentes, il est nécessaire de rappeler brièvement leur contexte historique.

La convention d'armistice franco-italienne avait été signée le 24 juin 1940. L'Italie n'était entrée en guerre avec la France que deux semaines auparavant, à un moment où les Allemands étaient aux portes de Paris et l'issue de la bataille ne faisait partant aucun doute. Mussolini décida donc d'imposer l'armistice aux Français quelques jours après l'armistice franco-allemand. Le dictateur fasciste, faisant encore une fois preuve de son outrecuidance, et de son opportunisme habituels, espérait profiter de cette occasion pour imposer à la France des conditions humiliantes et accaparer des territoires français en Europe et en Afrique. Toutefois, Hitler, soucieux de ménager le gouvernement de Vichy et craignant que l'empire français en Afrique ne s'enflamme en réaction à une surenchère d'exactions, contraignit Mussolini à modérer ses exigences. Il n'en reste pas moins, Monsieur le Président, que les conditions d'armistice furent *dictées par l'Italie à la France*, même si les autorités italiennes firent quelques concessions mineures.

Si j'insiste sur le contexte historique, Monsieur le Président, c'est qu'il est capital pour comprendre les dispositions de la convention qui intéressent directement. Ce fut l'Italie qui rédigea le projet de convention d'armistice et en effet il fut écrit en mauvais français — et en fait ce fut l'Italie qui imposa à la France ce projet, sauf sur des aspects marginaux.

La disposition de la convention, qui est centrale pour notre affaire, est l'article 3, alinéa 3, que vous trouvez, Messieurs les juges, dans notre dossier d'audience et qui est aussi projeté sur l'écran.

Cet article 3, alinéa 3, dispose entre autres qu'au sud de la Libye :

> «Une zone comprise entre la frontière lybique (sic) et une ligne parallèle distante de 200 kilomètres sera démilitarisée» pour la durée de l'armistice (contre-mémoire du Tchad, annexe 44).

Par ailleurs, l'article 4 de la même convention ajoutait que les zones démilitarisées, visées à l'article 3, seraient évacuées par les troupes françaises. Un autre article de cette convention, l'article 23, confiait à une «commission *italienne* d'armistice» dépendant du commandement suprême *italien* la charge de «régler et contrôler, soit directement, soit au moyen de ses organes, l'exécution» de la convention. Une «délégation» installée au siège de la commission, à Turin, en Italie, était autorisée à faire connaître à celle-ci «les *desiderata* de son gouvernement (le Gouvernement français) relativement à l'exécution» de la convention.

Le texte des dispositions que je viens d'évoquer confirme ce que j'ai dit tout à l'heure, à savoir que les Italiens *se considéraient* vainqueurs. Arrêtons-nous sur l'article 3, alinéa 3. Monsieur le Président, Messieurs les juges, un élément saute aux yeux. C'est que l'Italie, qui faisait à l'époque la pluie et le beau temps, impose à la France l'article 3, et dans cet article parle de la «frontière lybique» (sic) *méridionale*. Donc — j'insiste sur ce point, Monsieur le Président — *l'Italie part de l'idée* qu'une frontière méridionale libyenne existait bel et bien. Voilà un premier *démenti* éclatant apporté à la thèse de nos honorables contradicteurs.

Où était située cette frontière ?

Il est évident que l'article 3 de cette convention d'armistice ne devait ni ne pouvait le préciser; il lui suffisait de se référer à la *frontière méridionale existante*. Mais il est tout aussi évident que, pour appliquer l'article 3, il fallait identifier cette frontière. A cette fin, le président de la commission italienne d'armistice, le général italien Grossi, fit parvenir une lettre au président de la délégation française à Turin (contre-mémoire du Tchad, annexe 85).

La teneur de cette lettre se résume en trois points.

Tout d'abord, le général Grossi indiquait que le tracé de la frontière méridionale n'avait pas encore été «déterminé de commune entente» entre l'Italie et la France.

En deuxième lieu, le général Grossi admettait que le traité de 1935, le traité Laval-Mussolini, n'était jamais entré en vigueur et que, par voie de conséquence, le tracé prévu à l'article 2 de ce traité n'était pas juridiquement contraignant.

En troisième lieu, il faisait néanmoins valoir que l'Italie, lorsqu'elle avait «fixé à l'article 3 la limite extérieure de la zone démilitarisée» — ce sont là ses propres mots — «ne pouvait considérer comme ligne de base que celle qui, *selon sa propre interprétation*, devait être la frontière» (les italiques sont de nous). Autrement dit : comme c'est nous, les Italiens, qui avons établi l'article 3, c'est notre interprétation de cet article, et donc le tracé que nous, les Italiens choisissons, qui doivent prévaloir. Voilà, Monsieur le Président, un retour effronté à la maxime *quia sum leo* des fables d'Esope ! («C'est moi qui décide, parce que je suis lion et que tu es l'agneau»).

Dans leur réponse (contre-mémoire du Tchad, annexe 93), les Français mettaient les points sur les i : le tracé de 1935 était inacceptable, disent les Français, car le traité Laval-Mussolini avait été «récusé» par les Italiens eux-mêmes. Certes, il n'y avait pas eu de «convention ou traité fixant bilatéralement avec l'Italie le tracé de cette portion de frontière». Toutefois, malgré l'absence de convention bilatérale, l'Italie, ainsi continuait la note française, avait reconnu la ligne de 1899/1919; par voie de conséquence, la seule ligne à prendre en considération aux fins de la convention d'armistice était celle de 1899/1919. Voilà la réponse française, une réponse ferme, nette, argumentée et tout à fait cohérente avec la position que la France avait toujours soutenue.

Quelle fut la réaction italienne ?

Face à la prise de position française, on aurait pu s'attendre à une réaction d'autant plus dure et catégorique que l'Italie était — je le répète — *en position de force*. Tout comme elle avait imposé l'article 3 de la convention d'armistice, l'Italie aurait pu imposer aux Français son interprétation et son application de l'article 3, à savoir la ligne du traité Laval-Mussolini. Mais il n'en fut rien ! Loin de là : l'Italie préféra s'incliner devant la thèse française. Par une lettre du 14 juillet 1941, le président de la commission italienne d'armistice se contenta de relever que la question dépassait la compétence de la commission d'armistice et qu'elle était dépourvue d'importance pratique.

Monsieur le Président, Messieurs les juges, quelles conclusions pouvons-nous tirer de cet échange de lettres ?

A mon sens, quatre constatations s'imposent. Premièrement l'Italie, par le fait même de rédiger l'article 3, a formellement reconnu qu'il *existait une frontière méridionale de la Libye*, confirmant de la sorte la position qui était la sienne depuis bien des années.

Deuxièmement, l'Italie et la France tombèrent d'accord sur le fait qu'il n'existait pas entre elles de traité bilatéral portant spécifiquement sur la délimitation de la *frontière* méridionale de la Libye.

Troisièmement, l'Italie, face aux arguments précis avancés par la France, *renonça à insister sur le tracé de 1935*, qu'elle avait essayé d'imposer.

Mieux encore — c'est là ma quatrième remarquer —, au cours des tractations de 1941, l'Italie ne contesta jamais, même si elle avait la force politique pour le faire, *la valeur et le bien-fondé de la thèse française*, d'après laquelle seule comptait la frontière de 1899/1919.

6. Conclusion

Monsieur le Président, Messieurs les juges, j'en arrive ainsi au terme de mes remarques sur la reconnaissance italienne des effectivités française au BET. Je pense avoir montré que l'Italie a indéniablement reconnu ces effectivités et acquiescé aux droits souverains de la France. A l'affirmation, *réitérée*, de la présence étatique française, répondit donc une reconnaissance, *réitérée elle aussi*, par le Gouvernement italien, de cette ligne. Cette reconnaissance italienne contribua à une *consolidation* du titre coutumier français.

III. LA RECONNAISANCE DE LA SOUVERAINETE FRANCAISE PAR LA LIBYE

31. Monsieur le Président, Messieurs les juges, voilà pour ce qui est de la reconnaissance italienne.

Je voudrais maintenant souligner que la Libye, elle aussi, après avoir obtenu son indépendance, a *reconnu* la souveraineté française sur la bande d'Aouzou, jusqu'à la frontière que les Italiens avaient acceptée antérieurement.

La reconnaissance libyenne fut exprimée de façon manifeste en 1955, à l'occasion d'un incident important. Je dois répéter à ce propos ce que j'ai eu l'occasion de relever hier au sujet de l'incident de Jef-Jef, à savoir que les conflits, les affrontements, les incidents entre Etats ont de tout temps fait office de *révélateur* de la situation juridique existante. A l'occasion de ces conflits, en effet, les Etats concernés sont amenés à prendre position sur les points controversés et à manifester nettement leurs opinions et leurs thèses juridiques.

32. L'incident sur lequel je voudrais m'arrêter un instant est celui de Moya (ou d'Aouzou, comme nous l'avons appelé jusqu'à présent). Cet incident intervient en 1955, je viens de le dire, soit quatre ans après l'indépendance de la Libye.

Le 21 février 1955 une équipe libyenne quittait Koufra pour Aouzou.

Le 28 février 1955, un groupe de trois jeeps transportant six civils accompagnés par un officier, un caporal et onze soldats libyens, fut arrêté par un détachement français à Moya, à 10 kilomètres au nord d'Aouzou, c'est-à-dire à 80 kilomètres de la frontière franco-libyenne. Voilà, çà c'est Moya, à 10 kilomètres au nord d'Aouzou. Messieurs les juges, voici le récit de l'incident que fit à l'Assemblée nationale française, le ministre des affaires étrangères, M. Pinay, en réponse écrite à une question du député Bardoux. Le ministre français des affaires étrangères Pinay dit ceci :

> «Le sous-officier commandant la patrouille française, après avoir stoppé les véhicules, invita le chef de la mission libyenne à rejoindre aussitôt la frontière; ce dernier insistant pour voir le chef du poste d'Aouzou, une des jeeps fut autorisée à poursuivre jusque-là, après avoir été désarmée, les autres voitures demeurant sur place, sous la garde de soldats français. Le commandant du détachement libyen fit connaître au sous-officier, chef du poste [du poste d'Aouzou], qu'il avait mission de recenser la population d'Aouzou et de la faire visiter médicalement; invité à rejoindre la frontière, il quitta aussitôt l'oasis, où il avait passé un quart d'heure et n'avait aucunement été invité à déjeuner par le chef du poste qui, bien au contraire, lui refusa l'autorisation de procéder à son ravitaillement sur place et le fit reconduire sur le champ à Moya, d'où les trois véhicules du convoi regagnèrent le territoire libyen sans autre incident.» (Mémoire du Tchad, annexe 324.)

33. Quel fut l'impact de cette mission libyenne avortée ?

Monsieur le Président, relevons tout d'abord que la délégation libyenne, même si elle était accompagnée d'une escorte militaire, revêtait un caractère civil. Les tâches de la mission étaient non militaires : recenser la population et la faire inspecter par un médecin. Malgré cela, les militaires français *repoussèrent* de la manière la plus ferme l'équipe libyenne. On notera également que tandis que le gros de la mission libyenne restait à Moya sous la garde de militaires français, ceux de ses membres qui furent autorisés à poursuivre jusqu'à Aouzou, furent *désarmés*. Ce comportement de la France manifeste de la façon la plus éclatante la volonté de signifier que la mission étrangère, la mission libyenne, était sous la pleine souveraineté française.

Face à cette réaction française, que firent les membres de la mission libyenne ? Protestèrent-ils ? Firent-ils valoir un prétendu droit de circuler librement dans la bande d'Aouzou *Rien de tout cela*. Les Libyens plièrent bagages et rebroussèrent chemin sans souffler mot. Ils partirent séance tenante malgré la fatigue d'un voyage de sept jours (de Koufra à Moya), qu'un des participants décrira plus tard comme épuisant et énervant, dans la chaleur étouffante et fort inhospitalière du désert (mémoire du Tchad, annexe 272).

Monsieur le Président, l'on pourrait même s'étonner de l'attitude des Français, qui fut non seulement ferme et énergique, mais encore quelque peu rude : ils allèrent même jusqu'à s'abstenir délibérément d'inviter à déjeuner la mission libyenne. Le fait est, Monsieur le Président, Messieurs les juges, que les autorités françaises considéraient que *l'heure n'était pas aux politesses*.

Face à une intrusion non autorisée dans le territoire français, face à une violation flagrante de la

souveraineté française, il ne pouvait y avoir une seule réaction, dure et énergique : *expulser* immédiatement les intrus et les *ramener* à la frontière.

Mais, Monsieur le Président, Messieurs les juges, la réaction de la France ne s'arrêta pas là. Le 4 mars 1955, le ministre de France à Tripoli fit parvenir au Gouvernement libyen une protestation formelle. Ce sont les mots utilisés par le ministre de la France. Nous n'avons pas pu trouver le texte de cette note dans les archives diplomatiques. Mais son existence ne fait pas de doute, car la protestation française est mentionnée dans la réponse écrite de M. Pinay, que je viens de citer, donc du ministre des affaires étrangères français, ainsi que dans quatre documents diplomatiques (voir réplique du Tchad, annexe 86, mémoire du Tchad, annexes 256 et 257 et mémoire de la Libye, vol. III, p. 167). Nous connaissons aussi le contenu de la «protestation formelle» française, car cette protestation est résumée comme suit par M. Pinay : le ministre français à Tripoli a «fermement rappelé» au Gouvernement libyen «qu'Aouzou se trouve sur le territoire de l'Afrique équatoriale française, dont les frontières, fixées par des actes internationaux, ne peuvent être mises en doute» (mémoire du Tchad, annexe 341).

A la requête du ministre de la France d'outre-mer, qui avait instamment demandé à M. Pinay «de bien vouloir présenter auprès du Gouvernement libyen la protestation la plus énergique» (mémoire du Tchad, annexe 252), la protestation française fut renouvelée, et cela le 19 mars (voir la réponse écrite précitée de M. Pinay, *ibid.*). Il y eut donc deux protestations françaises.

Le Gouvernement libyen, auprès duquel étaient intervenues aussi les autorités britanniques pour tâcher de le ramener à la raison, finit par se ranger aux vues de la France. Il assura qu'à l'avenir Tripoli respecterait la souveraineté française sur Aouzou et s'abstiendrait d'envoyer des troupes dans cette région (dans la bande d'Aouzou). Ces assurances furent données au plus haut niveau, c'est-à-dire par le président du conseil, Ben Halim. Cela découle de plusieurs documents diplomatique français, notamment d'un télégramme envoyé à Paris par le ministre de France à Tripoli. Après avoir fait état de démarches entreprises par le ministre britannique à Tripoli, M. Graham, le télégramme rapportait que :

> «Le président du Conseil [libyen], auquel j'avais donné un sérieux avertissement à ce sujet, m'a confirmé la démarche de M. Graham en précisant que son gouvernement n'avait nullement l'intention de rouvrir la question d'Aouzou, *puisqu'il reconnaissait que ce village se trouvait sur le territoire français*.
>
> Il m'a promis également de notifier cette position au commandant des force de sécurité de Cyrénaïque et aux autorités civiles de cette région.» (Mémoire du Tchad, annexe 264.)

Voilà, encore une fois, une admission on ne peut plus explicite de la souveraineté française sur la bande

d'Aouzou.

J'ajoute que les engagements libyens sont établis par plusieurs sources. En raison de leur importance, ils furent rapportés par le Quai d'Orsay au ministre de la France d'outre-mer (mémoire du Tchad, annexe 266) et confirmés par le ministre de France à Tripoli au ministre des affaires étrangères, M. Pinay, dans une autre dépêche (mémoire du Tchad, annexe 267).

34. Monsieur le Président, Messieurs de la Cour, quelles leçons peut-on tirer de cet incident ?

Deux conclusions me paraissent s'imposer.

Tout d'abord, la vive réaction des autorités françaises sur le terrain et l'acquiescement des Libyens confirment sans le moindre doute que la zone que nous appelons maintenant «la bande d'Aouzou» était bien sous le contrôle effectif et l'autorité de la France.

Ensuite, l'attitude libyenne est dépourvue de toute ambiguïté. Elle est claire et nette. Tant par leur comportement sur le terrain que par leur réaction aux deux protestations françaises, les autorités libyennes ont reconnu de la façon la plus explicite qui soit, que la zone en question était bien sous la souveraineté française.

Permettez-moi d'ajouter une remarque, Monsieur le Président. Qui pourrait nier *un parallélisme éclatant et étonnant* entre l'incident que je viens de relater et celui de Jef-Jef, dont je vous ai parlé hier ? Tout comme à Jef-Jef en 1938 — dix-sept ans auparavant, Monsieur le Président ! — en 1955 l'Etat dont la souveraineté avait été violée fait valoir ses attributs souverains *sur le terrain*, en expulsant les intrus, et *proteste ensuite*, et de la manière la plus énergique. A mon sens, le deuxième incident, l'incident de 1955, l'incident de Moya et d'Aouzou *est encore plus parlant*. Il montre avec beaucoup plus de force — si c'était possible — que la bande d'Aouzou était soumise à la souveraineté française — ne serait-ce que parce qu'à cette occasion, l'admission explicite des droits souverains français émane de la plus haute autorité de la Libye, le président du Conseil Ben Halim.

35. En conclusion, Monsieur le Président, l'incident d'Aouzou apporte une confirmation exemplaire au fait que, dès son indépendance, la Libye a reconnu que la France était souveraine sur la bande d'Aouzou. La Libye a admis le bien-fondé des protestations par lesquelles Paris faisait valoir que la frontière méridionale de la Libye avait été «fixée par des actes internationaux». C'est M. Pinay qui parle. Ces actes internationaux, Messieurs les Membres de la Cour, ne sont autres que les «actes internationaux en vigueur» auxquels se réfère

six mois plus tard, le 10 août 1955, le traité franco-libyen d'amitié et de bon voisinage. Ainsi, sans la moindre solution de continuité, la frontière entre le Tchad et la Libye est restée celle qu'avaient établie les accords de 1899-1919.

Comme vous le voyez, Monsieur le Président, la troisième thèse tchadienne, tout en étant logiquement autonome par rapport aux deux autres thèses du Tchad, finit par s'y intégrer, finit par le confirmer et les renforcer.

La bande d'Aouzou est donc bien en territoire tchadien, et la frontière de 1899-1919, réitérée et formellement consacrée par le traité franco-libyen de 1955, est celle qui sépare le Tchad de la Libye au sud de celle-ci.

Je vous remercie beaucoup, Monsieur le Président, de votre patiente attention et je vous prie d'appeler à la barre M. Cot.

Le PRESIDENT : Thank you very much, Professor Cassese. Professor Cot.

M. COT : Monsieur le Président, Messieurs de la Cour,

Il nous a paru utile, à ce stade de nos plaidoiries, de vous présenter, avec l'aide de l'ingénieur général Gateaud, quelques observations au sujet des cartes produites par les deux Parties.

Monsieur le Président, la République du Tchad n'accorde pas aux cartes géographiques une importance fondamentale dans cette affaire. Nous ne considérons certainement pas les cartes comme constitutives d'un titre juridique. Si certaines cartes ont été évoquées plus longuement lors de nos plaidoiries, je pense par exemple à la carte du *Livre jaune* français, c'était pour éclairer la volonté des Parties, et je ne reviendrai pas sur ces démonstrations.

Au demeurant, la jurisprudence a aujourd'hui défini avec une certaine précision le rôle des cartes devant une instance juridictionnelle comme la vôtre. Comme l'a déclaré la Chambre en 1986, dans l'affaire du *Différend frontalier* :

> «la valeur juridique des cartes reste limitée à celle d'une preuve concordante qui conforte une conclusion à laquelle le juge est parvenu par d'autre moyens, indépendants des cartes» (*C.I.J. Recueil 1986*, p. 583, par. 56).

Les cartes, Monsieur le Président, Messieurs de la Cour, peuvent donc constituer des éléments de preuve concordants, en particulier lorsqu'une série de cartes établit la notoriété d'une ligne frontière ... ou infirme une notoriété alléguée.

C'est ainsi, me semble-t-il, qu'a procédé la Chambre dans l'affaire du *Différend frontalier terrestre, insulaire et maritime*, où après avoir rappelé la jurisprudence précédente que je viens de citer, votre Chambre continue :

> «pour les raisons qui ont été exposées par la Chambre constituée dans l'affaire du *Différend frontalier*, elle n'attache qu'une valeur de preuve concordante à un certain nombre de cartes du XIX[e] siècle — sur lesquelles le Honduras en particulier a attiré l'attention — qui indiquent les limites politiques des deux Etats, y compris en ce qui concerne le secteur en litige de la frontière terrestre qui est actuellement examiné. Dans la grande majorité des cas, ces cartes, si tant est qu'on y distingue une ligne suffisamment claire dans la zone considérée, confirment effectivement l'opinion selon laquelle c'est le cours actuel du Goascorán qui constitue la frontière» (*C.I.J. Recueil 1993*, p. 550, par. 316.)

La Partie libyenne a fait observer dans ses plaidoiries, que nous avions surtout produit des cartes d'origine française, donc suspectes de partialité.

Je précise, Monsieur le Président, que notre petit atlas n'avait pas seulement pour objet d'accumuler les cartes afin de souligner la notoriété de la ligne frontière que nous défendons, mais aussi de fournir à la Cour les éléments cartographiques nécessaires à la compréhension de tel ou tel passage de nos plaidoiries.

La composition de notre atlas n'a donc pas cherché à refléter un équilibre quelconque. Mais que nos contradicteurs se rassurent : dans le choix des carte retenues pour ma plaidoirie orale, j'ai pris en compte leur objection et j'insisterai tout naturellement, Monsieur le Président, sur les cartes établies par des Etats tiers ou par des organismes internationaux non suspects de partialité.

Nos honorables contradicteurs nous ont aussi reproché de ne pas fournir les cartes italiennes qui nous sont défavorables, parce que ne comportant aucune frontière. Je fais allusion ici en particulier aux cartes distribuées dans le dossier d'audience et projetées par le professeur Condorelli lors de sa plaidoirie. L'explication ici est simple, je l'avoue : ces cartes nous ne les avons pas trouvées, nous ne les avons trouvées ni à Londres, ni à Paris, ni à Rome, et encore à Rome ni au service juridique des armées, ni au ministère italien des affaires étrangères, ni dans les archives du ministère des colonies.

Je concède ce point à nos collègues de la Partie libyenne, mais permettez-moi en même temps, de retourner le compliment de la sélectivité et de faire observer, Monsieur le Président, que la Partie libyenne, elle, n'a produit que les cartes servant ses desseins. Nos contradicteurs ont délibérément écarté toutes les cartes qui pouvaient les embarrasser, n'hésitant pas à interrompre une série de cartes lorsque celles-ci leur devenaient défavorables, comme dans le cas des cartes de l'ONU qu'ils ont produites jusqu'en 1960 de manière très généreuse, mais en s'abstenant de poursuivre la série.

Monsieur le Président, Messieurs de la Cour,

Avant de projeter nos cartes, je souhaiterais faire quelques observations générales sur le matériel cartographique présenté par les deux Parties. Nous avons recensé toutes les cartes et croquis publiés et produits par les Parties dans leurs écritures. Nous avons écarté les croquis de démonstration établis par les Parties pour les besoins de la cause, croquis abondants, suggestifs, établis pour le compte de la Libye; croquis plus modestes, en nombre plus limité, établis pour le compte du Tchad.

En fin de compte, nous avons recensé 277 cartes et croquis *publiques*, donc contribuant à la notoriété de la ligne frontière — ou à son absence de notoriété, soient :

— 203 cartes et croquis présentés par le Tchad et déposés au Greffe de la Cour, conformément à votre Règlement, soient

— 98 cartes et croquis présentés par la Libye, dont une douzaine ont déposés au Greffe,

— 24 de ces cartes ou croquis ont été présentés simultanément par les deux Parties et sont donc comptés deux fois dans mon calcul.

Mais rassurez-vous, il ne s'agit pas d'un exercice statistique dans cette affaire, exercice qui n'aurait aucun sens !

La République du Tchad a présenté peu de cartes dans son mémoire. Nous n'avions pas de raison particulière de le faire. Notre thèse étant, et restant d'ailleurs, que la frontière entre les deux Parties est formée de deux lignes droites définies par les traités de référence. Dans une telle hypothèse, une carte ne saurait servir à préciser une ligne déterminée par les points astronomiques mais tout au plus à mieux situer cette ligne sur le terrain.

Mais en revanche, face au déploiement remarquable d'illustrations cartographiques dans le mémoire libyen — j'y reviendrai dans un instance —, le Tchad a cru nécessaire de corriger l'impression donnée par nos contradicteurs et de montrer que les cartes effectivement publiées abondaient dans le sens des conclusions de la République du Tchad. D'où le petit atlas annexé à notre contre-mémoire, avec des reproductions de cartes parfois difficiles à déchiffrer en raison du format choisi. Je vous prie de nous en excuser et c'est pourquoi nous nous sommes permis de vous faire distribuer ces petites loupes. On a la technologie qu'on peut...

La Jamahiriya arabe libyenne a présenté peu de cartes originales dans son mémoire. En général, d'ailleurs vous constaterez, Messieurs de la Cour, qu'elle a produit peu de cartes dans ses écritures, moitié moins que le Tchad, je l'ai dit : 98 contre 203 cartes pour nous, et surtout des cartes si je puis dire en défense, pour contester les affirmations du Tchad. En revanche, rarement, et pour cause, en appui à ses propres thèses. Pas une carte

publiée, publique donc, n'a été produite qui reprend la ligne frontière réclamée par la Libye dans ses conclusions. Il y a là une certaine cohérence puisque la Libye prétend que la frontière entre les deux Parties n'a jamais été délimitée et que, conséquence du postulat libyen, le tracé inexistant ne peut donc être reporté sur une carte.

En revanche, la Libye a fait établir un grand nombre de croquis en couleurs à fins de démonstration. Et je salue ici la performance esthétique et pédagogique de nos contradicteurs. Ce faisant, ils ont habilement essayé de «faire impression» sur la Cour. Ainsi par exemple la carte n° 1 du mémoire libyen. Toutes les frontières africaines, vous le voyez, y sont fidèlement reportées, comme si à une seule exception près (évidemment, ce sont les frontières méridionales de la Libye) mais autrement vous retrouvez à peu près les autres frontières, comme s'il s'agissait de la seule zone du continent africain sans frontières définies. Le fléchage en outre produit une sorte d'effet d'entonnoir, que vous voyez bien, qui est comme une invitation à l'extension de la souveraineté libyenne vers le sud.

Faute de pouvoir illustrer par des cartes publiques ses prétentions frontalières, telles qu'elles résultent de ses conclusions — en gros, le 15° parallèle — La Partie libyenne essaie de suggérer cette ligne, de l'acclimater en la présentant comme une frontière qui s'imposerait d'évidence :

— frontière naturelle,

— frontière historique.

La carte n° 8 du mémoire libyen est assez caractéristique d'une série de cartes libyennes présentées dans le mémoire, assez caractéristique de cette manière d'accréditer indirectement le 15° parallèle. Vous voyez où il se trouve et vous voyez du coup les couleurs changer. Cette carte-ci décrit la végétation en Afrique. Mais on trouve d'autres cartes du même type, toutes aussi parlantes, toutes aussi belles, toutes aussi colorées pour les sols, la pluviométrie ou le climat.

La démonstration est claire; la nature se charge de tracer sur le terrain la ligne fâcheusement oubliée par les politiques et les cartographes. On retrouve la même technique s'agissant des activités sociales, par exemple dans la carte n° 19 du mémoire libyen. Carte qui, vous le voyez, distingue les régions d'Islam et les régions chrétiennes, et toujours avec la même coupure, c'est-à-dire approximativement le 15° parallèle. Ici, comme par hasard, les deux grandes zones de religion se distribuent le Tchad équitablement, si je puis dire. Nous avons aussi et dans le même style une carte sur la répartition des Toubous et tribus apparentées qui elle aussi recoupe, retrouve comme par hasard la même ligne.

— Enfin, la démonstration devient d'un goût plus douteux. Vous pouvez me projeter la carte n° 103 du mémoire libyen. Voilà. Lorsque les auteurs du mémoire libyen invoquent, à l'appui de leur thèse, le croquis du colonel Spartacus relatif à l'opération Manta, avec ici la «ligne rouge», qui est au 16° parallèle — la «ligne rouge», vous le savez, Monsieur le Président, Messieurs, étant la ligne militaire de protection établie par les forces tchadiennes et françaises lors de l'invasion libyenne de 1983-1984 — ligne tracée en fonction du rayon d'action de l'aviation française appelée au secours par les autorités légales libyennes.

Nous espérons pour notre part que la période des grandes invasions est révolue et j'ajoute que la Partie tchadienne n'a pas beaucoup apprécié ce rappel.

Peu de cartes publiées dans le contre-mémoire libyen, ce sont surtout des croquis de démonstration. C'est normal, puisque la Partie libyenne n'avait pas encore eu l'occasion de voir et de critiquer notre petit atlas. La réplique libyenne, elle, constitue cette réponse. Et cette tentative de réfutation de notre matériel cartographique est, je dois le dire, assez difficile à suivre puisque répartie entre le corps du texte de la réplique, les annexes supplémentaires du volume 2 et les productions : les «exhibits».

J'observe à ce propos, Monsieur le Président, que la réplique libyenne ne cherche plus à suggérer, à illustrer, fût-ce indirectement, la thèse du 15° parallèle. En revanche, une nouvelle ligne fait son apparition. Si vous pouvez me projeter la carte n° 10-B de la réplique libyenne.

C'est toujours suivant le même procédé de la suggestion et de la surimpression : ici il s'agit de la ligne mathématique (true south-east). Nous la voyons ici surimprimée sur la carte de Justus Perthes, de 1892 et nous la retrouvons sur de nombreuses cartes de la réplique libyenne, en particulier sur les cartes illustrant la présence militaire française dans la région de 1914 à 1930.

— Enfin, nous trouvons la ligne mathématique surimprimée sur un croquis relatif au «régime frontalier» de la convention de 1955. Vous le voyez ici (carte n° 6-A, p. 69 de la réplique libyenne).

— en même temps d'ailleurs qu'une autre ligne — anachronique celle-là, de l'aveu des deux Parties — celle du traité de Rome de 1935.

On peut se demander pourquoi la ligne mathématique en surimpression sur un croquis illustrant le traité de 1955 alors que plus personne ne pense à cette ligne mathématique depuis belle lurette !

L'insistance mise par la Partie libyenne sur la ligne dite «mathématique» dans sa réplique constitue-t-elle une position de repli, après la ligne du 15° parallèle ? Le professeur Higgins a posé la question vendredi dernier. Ce n'est pas à nous d'en juger. Je note cependant que ces surimpressions ne sont pas innocentes et qu'elles

déplacent très sensiblement vers le nord, ou plus exactement qu'elles pourraient déplacer très sensiblement vers le nord, ou plus exactement qu'elles pourraient déplacer très sensiblement vers le nord, les conclusions de la Partie libyenne, conclusions formelles ou suggestions informelles, nous verrons bien !

Monsieur le Président, Messieurs de la Cour, reprenons maintenant l'ensemble des cartes et des croquis publics qui ont été produits par les Parties. Je ne vais pas projeter toutes ces pièces, rassurez-vous, je m'en tiendrai à quelques constatations et à quelques échantillons.

D'abord la carte de l'atlas n° 2.

Avant 1899, nous le savons, la plupart des cartes ne portent pas de frontière au sens moderne du terme. Pourtant celle-ci, la carte Justus Perthes de 1892 porte bien une *grenze*, donc une frontière, pour désigner la frontière de la Tripolitaine. On la voit, on la devine et je vous renvoie aux explications du professeur Pellet à cet égard. Plus au sud, la région est mal connue, inexplorée; ceci explique l'absence de tout tracé-frontière — au demeurant la région à cette époque n'était pas couverte par des accords internationaux.

A partir de 1899, tout change sur les cartes. Une ligne apparaît. La carte du *Livre jaune* (mémoire libyen, carte n° 40), qui vous est projetée en ce moment et que vous voyez apparaître, cette carte du *Livre jaune* qui accompagne, nous le savons, la déclaration de 1899 lors des négociations entamées entre les autorités françaises et italiennes de l'époque. Je n'insiste pas sur ce chapitre que nous avons déjà traité.

Nous retrouvons ce même tracé sur la carte publiée dès 1899 dans le journal *Le Figaro* ainsi que sur celle publiée dans le *Bulletin du comité de l'Afrique française*. Si vous pouvez la projeter, s'il vous plaît. Oui, c'est à peu près le tracé de la carte du *Livre jaune*.

Et ici, il est intéressant de noter que le massif du Tibesti, tel qu'il est alors connu, est entièrement situé au sud de la ligne frontière. On retrouve logiquement ce tracé de la ligne du *Livre jaune* dans toutes les cartes publiées par les autorités françaises de l'époque; vous en trouverez des exemples dans notre petit atlas.

Des cartes d'autre provenance portent d'autres lignes, notamment la ligne dite «mathématique». Ainsi la carte n° 14-A du contre-mémoire libyen dont nous avons fait agrandir le secteur géographique intéressant.

C'est une carte britannique publiée par la *Royal Geographic Society*. Vous voyez et qui, elle, porte la ligne dite «mathématique» stricte sud-est. Mais nous verrons, à cet égard, que dès la signature de la déclaration franco-britannique du 8 septembre 1919, les cartes britanniques adoptent la ligne qui aboutit au point 19° 30' de latitude nord, à peu près ici. Et nous notons aussi que le négociateur de l'accord de 1919, Mac Michael, transmet à lord Allenby, le haut-commissaire britannique au Caire, une lettre expliquant les raisons de ce qu'il

considère comme l'erreur commise par les cartographes britanniques dans la période précédente (réplique du Tchad, annexe 43, 5 mars 1913). Erreur, dont cette carte est une illustration d'après Mac Michael.

La Partie libyenne a produit dans ses écritures, nous le savons, des cartes italiennes de la même époque — vous pouvez projeter la carte de la réplique libyenne n° 16-B, par exemple — qui portent la ligne dite «mathématique». Celle-ci qui date de 1912, est intéressante, Monsieur le Président, Messieurs de la Cour, parce que, elle aussi, indique que l'ensemble du massif du Tibesti, d'après les connaissances des cartographes italiens de l'époque se trouve au sud de la ligne frontière, bien que la carte reprenne par ailleurs la ligne «mathématique». Ces cartes italiennes enregistrent, ce que j'appellerai, une incontestable zizanie entre les services italiens puisqu'elles ne correspondent guère aux positions prises par le Gouvernement italien à la même époque et qui ont été analysées par le professeur Cassese.

La déclaration franco-britannique du 8 septembre 1919 clarifie la situation cartographique relativement à l'interprétation de la déclaration de 1899. Nous le savons, elle fixe désormais la ligne frontière suivant «la direction sud-est» pour la faire aboutir au point défini sur la frontière soudanaise par les coordonnées 24° est et 19° 30' nord. Cette précision est immédiatement enregistrée sur les cartes produites par les parties à la déclaration franco-britannique.

Si vous pouvez me projeter par exemple la carte 15A du contre-mémoire libyen. Voici cette nouvelle carte britannique, toujours de la Royal Geographic Society de 1924, elle a rectifié la position. Vous trouvez le même tracé, donc tracé défini par l'accord de 1919, dans les autres cartes britanniques aussi bien que la Royal Geographic Society que du War Office, qui ont été produites par les Parties. Vous trouvez cette même ligne sur les cartes françaises qui gagnent ainsi en précision. Vous trouvez enfin cette ligne sur les cartes du congrès de la paix de 1919 et sur la carte adjointe à l'accord de 1924. Mais surtout, ce qui me paraît important de noter ici c'est que la ligne «mathématique» a disparu. Vous ne la retrouverez plus, Monsieur le Président, sur une seule carte *publique* produite par les Parties. Désormais, quand la frontière est indiquée, c'est la ligne de 1919. Et il faudra pratiquement attendre les surimpressions de la réplique libyenne, ou plus exactement du mémoire libyen, mais surtout de la réplique libyenne, c'est-à-dire plus de soixante-dix ans pour voir le phénix mathématique renaître de ses cendres.

Le professeur Cassese vous a retracé les hésitations et divisions de l'administration italienne pendant l'entre-deux-guerres. Hésitations reflétées dans ces cartes sans frontière projetées par le professeur Condorelli, et plus encore dans les cartes relatives aux programmes coloniaux, traduction des nostalgies et des appétits du

lobby colonial italien.

A partir de 1935 et avec la signature du traité de Rome, les cartes se remettent à l'unisson.

— Les cartes italiennes, qui enregistrent bien sûr le tracé du traité de Rome,

— les cartes britanniques toujours — et si vous pouvez projeter la carte 16B du contre-mémoire libyen — nous avons ici donc le tracé du traité de Rome, c'est une carte de 1935,

— enfin les cartes françaises qui, elles aussi, enregistrent dès la signature du traité la carte d'atlas n° 53, cette carte de 1935, carte française, qui corrige donc la cartographie française dès la signature du traité en anticipant sur sa ratification et sur l'échange de ratifications, c'est la décision immédiate pour ce qui concerne les cartes géographiques françaises.

Cette période d'heureuse unisson est brève, puisque dès 1938 les cartes se mettent de nouveau à diverger, lorsqu'il apparaît que les échanges de ratification du traité de Rome n'auront pas lieu, donc que le traité Laval-Mussolini n'entrera pas en vigueur.

Est-ce à ce moment-là un retour au *statu quo ante* ?

Pas tout à fait. La ligne dite «mathématique», nous l'avons vu, a définitivement disparu de la cartographie depuis 1919.

Les cartes italiennes montrant l'absence de délimitation au sud de la Libye disparaissent à leur tour, après un bref retour. Si vous pouvez me projeter la carte italienne de 1941 du ministère des affaires étrangères.

Monsieur le Président, Messieurs les juges, vous reconnaissez cette carte que le professeur Condorelli vous a projetée. Regardez-la bien cette carte, Messieurs de la Cour, observez-la bien une dernière fois ! Regardez-la bien parce que vous ne la verrez plus pendant cinquante ans ! Ce type de carte va disparaître pendant un demi-siècle. Aucun Etat, aucun cartographe public ou privé, aucune des Parties à l'affaire, ni la France, bien sûr, ni le Tchad, ni le Royaume-Uni, ni l'Italie, ni la Libye, ne prétend désormais, par les cartes, qu'il n'y a pas de frontière délimitée.

Cette carte, c'est le chant du cygne des revendications coloniales maximales italiennes.

Et il faudra attendre 1991 et le mémoire libyen pour voir réapparaître ce type de cartes, avec la revendication correspondante portant sur la moitié du territoire du Tchad. Les autres cartes publiées à partir de cette date hésitent en effet entre le tracé du traité de Rome de 1935, vous pouvez projeter la carte 72 de notre atlas.

Voici par exemple une carte allemande de 1940 qui reprend la ligne laval-Mussolini, vous la voyons très

clairement.

C'est aussi d'ailleurs le cas des autres cartes italiennes, pouvez-vous me projeter la carte 78 de notre petit atlas. On voit moins bien la frontière mais on la devine, coupant le massif, elle est ici.

C'est une carte italienne du commandement supérieur des forces armées. Elle date de 1941, c'est-à-dire de la même année que la carte que j'ai appelée carte «chant du cygne colonial». Mais *elle* porte la ligne du traité de Rome de 1935.

En revanche — et ceci dès 1938 — les cartes françaises reviennent au tracé de la frontière de 1919. Si vous pouvez me projeter la carte n° 67 de notre atlas.

Voici, celle-ci date de 1938 et elle reprend — on devine l'angle — la ligne de l'accord de 1919. C'est une carte du service géographique de l'armée française. Elle n'a pas attendu que l'encre soit sèche sur la lettre par laquelle le comte Ciano renonce à l'échange de ratifications pour revenir à la ligne de 1919.

Vous trouverez d'autres exemples, Messieurs de la Cour, des cartes françaises dans le petit atlas, aussi bien les cartes de l'ING que les cartes routières Michelin, les cartes géologiques, etc.

Toutes, après 1938, indiquent la frontière de l'accord de 1919. Si la France enregistre tout de suite la non-ratification du traité, les autres nations mettent un peu plus longtemps pour corriger leurs cartes.

Ainsi, par exemple, la carte 87, cette carte, plutôt ce croquis, publié par «The Geographer», le service officiel américain en 1943 marque bien encore la frontière de l'accord Laval-Mussolini. Et nous avons dans le même style relevé une carte de la National Geographic Society de 1950 qui continue à figurer cette ligne anachronique et que vous trouverez dans notre petit atlas.

Les cartes britanniques, elles, ne sont corrigées qu'après la guerre. Nous avons donné une carte du War Office de 1948 qui, elle, revient bien à la ligne de 1919. Il y a donc là encore un flottement dans cette période. C'est un flottement que l'on comprend bien. A partir de 1940 les principaux protagonistes de notre affaire sont en guerre. Les priorités sont ailleurs, et de 1945 à 1949 l'incertitude règne et sur le sort des anciennes colonies italiennes et sur l'éventuel ajustement de leurs frontières. Je ne reviens pas par ailleurs sur ce qu'il faut appeler malheureusement le cafouillage de la représentation diplomatique française à la conférence des suppléants des quatre puissances, ou à l'erreur commise par le Secrétariat de l'ONU en 1950, le professeur Franck vous a expliqué tout cela.

Mais, en l'espèce, si diplomates et politiques ne sont pas capables d'y voir clair dans cette période, et nous vous l'avons montré des deux côtés de la barre, on comprend bien que les cartographes, exécutants de la ligne

politique, ne s'y retrouvent guère de leur côté.

Précisons cependant, Monsieur le Président, Messieurs, la nature de ce flottement. Les hésitations de la décennie 1940-1950 sont en effet très différentes de celles que nous avons observées avant 1919. Il ne s'agit plus ici d'une divergence d'interprétation sur le tracé de la ligne frontière, il ne s'agit plus de savoir ce que veut dire la «direction sud-est». Tout cela est réglé depuis 1919. La ligne «mathématique», je l'ai dit, est définitivement enterrée. Et tout le monde est convaincu, d'après les cartes publiées, qu'il y a bien une frontière. Il n'y a plus de cartes sans frontières, de cartes-entonnoirs ! L'incertitude, pendant cette période de flottement, porte exclusivement sur le point de l'entrée en vigueur ou non du traité Laval-Mussolini, et donc de la substitution ou non, à la ligne décrite par l'accord franco-britannique de 1919, de la ligne décrite par le traité de Rome de 1935. En d'autres termes, il s'agit désormais de choisir entre deux lignes : 1919 ou 1935.

Cartographes et éditeurs ne se posent plus un problème d'exactitude du tracé ou d'interprétation des textes : c'est réglé ! Mais un problème de choix entre ces deux lignes frontières qui enserrent ce qu'on appellera plus tard la bande d'Aouzou. A partir de 1950, les cartes portent la ligne de 1919, parfois d'ailleurs en indiquant la contestation territoriale entre les deux lignes possibles.

Donnons un exemple : la carte de notre atlas n° 153.

C'est une carte américaine récente de la *National Geographic Society* de 1990. Elle porte — nous allons voir l'agrandissement de plus près — les deux lignes, vous voyez, elle porte principalement la ligne frontière de 1919 et elle porte en pointillé le ligne du traité Laval-Mussolini avec une indication "claimed and partly occupied by Libya". Et l'indication c'est "Aouzou's strip".

Nous voyons donc bien ici, sur cette carte, que la *National Geographic Society* reflète les données du problème tel qu'il se pose après la seconde guerre mondiale, le problème est celui de la bande d'Aouzou, "Aouzou's strip".

Un mot sur les cartes de l'ONU. Je ne reviens pas sur la démonstration de mon collègue, M. Franck, qui a expliqué les tâtonnements de la commission d'enquête des quatre puissances,

— le croquis de 1950 illustrant les hésitations de la commission intérimaire de l'Assemblée générale,

— et l'origine de l'erreur portée sur les cartes de l'Organisation.

Si vous pouvez me projeter la carte de l'ONU 235, qui est la première des cartes sur lesquelles nos collègues de la Partie libyenne appuient leur démonstration. Avec la ligne de 1935, c'est la "Map 235" de décembre 1949 des Nations Unies, et on voit bien les petits créneaux caractéristiques de la ligne

Laval-Mussolini. Cette carte qui a pour objet de décrire les principales routes et pistes, je souligne "as principle transport routes", date de 1949 et montre donc la ligne de 1935. Cette carte est intéressante parce que c'est la matrice des cartes erronées publiées par l'Organisation dans la décennie suivante. Nous avons mené une enquête auprès du Secrétariat général de l'ONU sur cette carte et le professeur Franck vous en a retracé la genèse et la postérité.

Nos contradicteurs libyens ont fait grand cas de cette série de cartes ouverte par la carte de 1935. Malheureusement, comme je l'ai indiqué tout à l'heure, ils n'ont pas poussé leur curiosité au-delà de la date de 1958, sinon ils auraient raconté la suite et publié la série complète des cartes de l'ONU. Ils pouvaient même publier la carte 141 de notre petit atlas; voici une carte — je crois que c'est d'ailleurs de février 1963 des Nations Unies — qui elle, porte la ligne de 1919.

J'observe que, depuis le début des années soixante, *toutes* les cartes publiées par l'ONU portent la frontière de 1919. Le professeur Franck vous en a projeté une série identique à celle-ci, qui se poursuit jusque dans les années quatre-vingt. Ces cartes ne font pas un sort particulier à la frontière avec le Tchad, qui, vous le voyez, est indiquée avec le même type de pointillés que l'ensemble des frontières internationales de la Libye. Ces cartes n'indiquent pas que ce tracé-là est particulièrement contesté. Ces cartes traduisent, en ralliement du service cartographique de l'Organisation, un consensus quasi unanime — nous le verrons dans un instant M qui s'établit dans l'opinion cartographique touchant la frontière méridionale de la Libye.

La Partie libyenne a essayé de réduire la portée de ces cartes plus récentes de l'Organisation en les considérant comme des cartes techniques, illustrant des rapports techniques.

C'est vrai. Mais c'est tout aussi vrai, Monsieur le Président, des cartes antérieures. La carte matrice de l'erreur, celle que je viens de vous projeter auparavant, la carte n° 235 de 1949, était destinée à la revue des transports et communications de l'Organisation des Nations Unies. Quant aux croquis accompagnant les rapports du haut-commissaire, M. Pelt, ils n'avaient pas pour fonction de préciser les frontières, problème qui ne relevait pas de la compétence du haut-commissaire. Après 1955, et donc après la signature du traité du 10 août 1955, le consensus sur la ligne de 1919 devient écrasant dans l'ensemble des cartes publiées.

— Toutes les cartes de l'ONU, je l'ai dit,

— toutes les cartes françaises,

— toutes les cartes britanniques,

— toutes les cartes américaines,

— toutes les cartes italiennes,

— même les cartes soviétiques,

si vous pouvez me projeter, voici une carte soviétique de 1985.

C'est une carte intéressante. Elle émane d'une grande puissance, d'une grande puissance qui a plutôt de la sympathie à l'époque pour le région libyen, et cependant elle reprend le tracé de 1919 parce qu'elle enregistre le consensus international qui s'est formé à l'époque.

Seules les cartes libyennes continuent de figurer la ligne du traité de 1935. (Vous pouvez me projeter la carte n° 150 de notre atlas.) Nous avons une carte de provenance libyenne, et non pas anglaise comme indiqué par erreur dans le dossier d'audience. Cette carte libyenne qui reprend le traité, nous retrouvons le petit créneau de la ligne Laval-Mussolini.

Ce n'est pas en l'espèce, je le souligne, une absence de frontière, non, elle est bien là. Ce n'est pas en l'espèce, je le souligne, une ligne mathématique — elle n'a rien de mathématique — c'est la ligne du traité Laval-Mussolini dont nos contradicteurs conviennent aujourd'hui qu'elle n'a aucun fondement juridique.

Monsieur le Président, Messieurs de la Cour,

Cette unanimité — ou quasi-unanimité — des cartes (je fais exception des cartes libyennes), depuis la signature du traité du 10 août 1955, répond bien, me semble-t-il depuis trente ans au moins, aux critères posés par le tribunal arbitral dans l'affaire du *Canal de Beagle*. Je cite :

> "Where there is a definitive preponderance on one side — particularly if it is a very marked preponderance — and while of course every map must be be assessed on its own merits M the cumulative impact of a large number of maps, relevant for the particular case, that tell the same story — especially when some of them emanate from the opposite Party, or from third countries, — cannot but be considerable, either as indications of general or at leat widespread repute or belief, or else as confirmatory of conclusions reached, as in the present case, independently of the maps." (Sentence du 18 avril 1977, p. 84, par. 139.)

Monsieur le Président, en l'espèce, il me semble que les indications données par la carte, l'ensemble de la cartographie depuis 1955 et depuis trente ans, répondent bien à ces exigences.

Nous verrons d'ailleurs que, pour reprendre la formule du tribunal arbitral dans l'affaire du *Canal de Beagle*, "some of the maps" — at least one — "emanate from the opposite Party". Mais n'anticipons pas.

Monsieur le Président, Messieurs de la Cour, il me reste à évoquer maintenant, pour compléter cette projection, le cas de trois cartes significatives, ceci afin de répondre à l'argumentation de la Partie libyenne.

La première concerne la carte publiée par l'institution officielle des Etats-Unis d'Amérique, "The Goegrapher". Vous pouvez me projeter la carte n° 135 de notre atlas.

Cette carte est une carte intéressante en raison de son origine, c'est simplement un croquis, mais c'est un croquis qui a une autorité particulière.

Etudiant les frontières africaines dans son ouvrage faisant autorité, le professeur Brownlie s'exprime ainsi au sujet de ce type de carte :

> "Various categories of evidence may overlap. Thus the Geographer of the United States Department of State publishes material (*International Boundary Studies*), which is both official in provenance, since he is an authorized government agency, and also expert evidence in terms of its technical provenance. Evidence of the views of third states is relevant not only when the location of tripoint boundary junctions is in issue, but in general as evidence of general recognition of an alignment and of its notorious and public character. Thus official maps produced by United Kingdom, French and American government agencies provide evidence of the alignments of African boundaries." (African Boundaries, p. 5.)

La partie libyenne, embarrassée par cette carte, a cherché à contourner l'argument en observant que les études de *"International Boundary Studies"* ne sont certainement pas neutres, mais expriment la position officielle du Gouvernement américain (réplique de la Libye, annexe supplémentaire, vol. 2, n° 2, p. 15).

Monsieur le Président, Messieurs de la Cour, gardons-nous ici de tout anachronisme. Le Gouvernement américain n'avait aucune raison, en 1961, de favoriser la République du Tchad plutôt que le Royaume-Uni de Libye, où les intérêts américains, je vous le rappelle, intérêts stratégiques, intérêts économiques et intérêts pétroliers étaient alors substantiels.

Nous maintenons donc pour notre part que l'opinion du "Geographer", en 1961, est d'un intérêt appréciable pour notre affaire.

La seconde carte a été publiée par l'Organisation de l'aviation civile internationale en 1959.

— Cette carte, où vous voyez le tracé frontière, ici, qui est bien le tracé de 1919, est l'expression par une autre organisation internationale de la conviction partagée quant au tracé de la ligne frontière;

— cette carte ne mériterait pas davantage de remarques si la Partie libyenne n'avait pas produit un début de correspondance échangée en 1955 entre le Gouvernement français et le Secrétaire général de l'Organisation de l'aviation civile internationale au sujet de la ligne frontière à indiquer sur les cartes aéronautiques.

Nos collègues libyens concluent dans leurs écrits à l'annexe supplémentaire au volume 2 de leur réplique : "The end of this saga is not revealed by documents found in the Quai d'Orsay Archives." (*Ibid.*, annexe supplémentaire, vol. 2, p. 4, par. 4.)

Puis-je respectueusement, Monsieur le Président, faire observer que la fin de l'histoire ne se trouve peut-être pas dans les écrits des archives du Quai d'Orsay, mais se trouve probablement dans la carte projetée, publiée par l'OACI en 1959, l'OACI ayant entre-temps mené à bonne fin son enquête ?

Enfin, la troisième série de cartes concerne les recherches pétrolières.

— Le croquis initial (map n° 1) est annexé au règlement pétrolier proclamé le 14 août 1955. Et vous le voyez ici, c'est un croquis auquel la Partie libyenne accorde de l'importance.

La réplique libyenne qualifie d'ailleurs ce croquis en le décrivant ainsi :
"a conservative line based on the U.N. map that illustrated the uncertainty attached to this boundary was a safe line to pick as a guide to foreign oil companies" (réplique de la Libye, p. 74, par. 3.63 *in fine*).

Permettez-moi, Monsieur le Président, Messieurs de la Cour, de dire que la Partie libyenne a une conception assez curieuse d'une "conservative line". Elle fait au demeurant elle-même la démonstration de cette contradiction dans sa carte — si vous pouvez projeter maintenant le croquis bien fait par la Partie libyenne et qu'elle publie dans la réplique. C'est en effet la carte LR 2 de la réplique libyenne, où la Partie libyenne fait la démonstration de sa contradiction.

Cette carte, en effet, superpose — je ne sais pas si vous le voyez de près — la ligne de la carte des Nations Unies (UN map n° 241) et le croquis que nous venons de projeter (n° 1955, Libyan Petroleum Regulation Map n° 1).

Vous voyez que ces deux lignes ne coïncident pas et que la carte pétrolière libyenne en prend quelque peu à ses aises, en particulier dans ce secteur, avec la carte de l'Organisation des Nations Unies

— notamment dans les zones pétrolières, un peu plus haut dans le secteur d'Edjelé qui est par ici;

— on voit qu'elle pénètre en territoire algérien et que cette pénétration n'est pas négligeable puisqu'elle est à une bonne centaine de kilomètres au large de Ghat.

Au demeurant, le croquis pétrolier que je vous avais projeté d'abord et qui accompagne la loi pétrolière libyenne de 1955, suscite une protestation immédiate de l'ambassadeur de France à Tripoli.

— De même que la France protestera contre les cartes publiées par la Bande mondiale dans son étude sur le développement économique de la Libye en 1960.

— La Libye produit aussi en réplique trois cartes privées de prospection pétrolière, inspirées, c'est normal, par le croquis officiel de 1955.

— En revanche, elle cherche à sous-estimer l'importance de la carte publiée par ses propres services en 1962, carte que nous avons reproduite dans l'Atlas n° 142.

— Cette carte est une carte à laquelle nous attachons de l'importance. Elle est établie par les géologues des services officiels américains pour le compte du Gouvernement libyen et porte clairement, vous le voyez, la

frontière de 1919 et du traité de 1955.

— Elle est établie après consultation des différents ministères libyens compétents. Comme vous voyez, United States Department of the Interior, Geological Survey (c'est le département de l'intérieur américain qui dresse la carte pour le compte du Gouvernement libyen), United Kingdom of Libya, Ministries of National Economy, Petroleum Affairs and Industry.

— L'histoire de cette carte est éclairée par la note de l'ambassadeur Sebileau, ambassadeur de France à Tripoli, note en date du 28 avril 1961 dont vous trouverez la reproduction dans la réplique libyenne (Exhibit, part. A (1-6), vol. 3, série 6-10, dernier document).

— L'ambassadeur Sebileau craint la publication d'une carte officielle libyenne portant une frontière différente de la frontière du traité de 1955.

— Il propose donc au département de faire des démarches auprès du Gouvernement libyen et des autres gouvernements concernés, afin que ne soit pas sortie une carte officielle qui contredirait le texte du traité de 1955.

— Je constate que cet ensemble de démarches a été couronné de succès puisque la carte officielle, comportant certains "disclaimers", publiée au nom du Royaume-Uni de Libye porte la frontière de 1919 indiquée par le traité de 1955.

Monsieur le Président, Messieurs de la Cour, pour résumer mon propos, quatre constatations à propos des nombreuses cartes produites par les Parties à la présente instance :

1) je relève que pas une seule carte publiée ne porte la ligne réclamée par la Libye dans ses conclusions — c'est-à-dire la frontière du 15° parallèle;

2) je relève que pas une seule carte publiée depuis 1919 ne porte la ligne dite «mathématique»;

3) je relève que pas une seule carte publiée depuis l'indépendance des deux Parties ne porte la ligne du traité de Rome de 1935 (à l'exception bien entendu des cartes libyenne), tout au plus cette ligne est-elle indiquée en alternative avec la frontière de 1919, encadrant la bande d'Aouzou, comme nous l'avons vu dans la carte du National Geographic.

4) enfin, je relève que pas une seule protection libyenne contre ces nombreuses cartes publiées depuis l'indépendance des deux Parties m'a été émise alors que le Gouvernement français, puis le Gouvernement tchadien, ont réservé leurs droits à chaque reprise lorsque quelques cartes ont porté le tracé de la frontière de 1935.

Monsieur le Président, plaise à la Cour de considérer sur ce point que l'ensemble des cartes déposées par les Parties constitue un élément de preuve concordant à l'appui des dires de la République du Tchad.

Je vous remercie pour votre attention et après la pause, si vous le voulez bien, je vous demanderai d'appeler à la barre le professeur Franck.

The PRESIDENT: Thank you very much, Professor Cot. So we will take our break now.

L'audience est suspendue de 11 h 25 à 11 h 40.

The PRESIDENT: Professor Franck.

Mr. FRANCK:

The effectivity of the line after the independence of Libya and Chad

The international recognition of this line at the United Nations:
at the critical dates Libya was a beneficiary of,
and repeatedly acquiesced in, the new law of
decolonization practised by the United Nations

I. International recognition of the 1955 line at the United Nations

1. Thank you, Mr. President, distinguished Members of Court. As Chad constantly re-emphasizes, the 1955 Treaty is the rock upon which our case is built. But Chad also believes that, even if there had been no treaty in 1955, the line which that Treaty describes, had already become the legal boundary between Libya and French Equatorial Africa. This is due to the operation of colonial treaties and effectivities. But it is also due to operation of the law and practices of decolonization at the United Nations. Libya's boundary was not contested at its independence in 1951 and it was confirmed as between Libya and Chad on Chad's independence in 1960.

The customary law and practice of decolonization holds presumptively that new States come to independence with the borders as they were on the terminating of their status as dependencies. This strong presumption is rebuttable but it is not easily rebutted and it must be rebutted in a timely fashion by those claiming an exemption.

2. At the time of its independence Libya was deeply committed to, and benefited from this very principle. In 1948 to 1952, Egypt had made claims for border adjustments and recognitions of historic title to Libya's east. France made claims to Libya's west based on ethnic and geographic factors. The Emir Idriss of Cyrenaica, soon to become King of Libya, informed Secretary-General Trygve Lie of his implacable opposition to "any decision which is taken to cut off any part of Libya in favour of another country . . ." (MC at p. 207 (E) (fr.), para. 99 and cites therein). Contrary to the "pauvre Libye" thesis her advanced, the Emir and his advisers were neither ignorant nor passive. He did, however, look to the United Nations, and not in vain, do defend Libya's territorial inheritance. Mr. Pelt, the United Nations Commissioner, was a veritable tiger in that cause. Sir Ian Sinclair notes, as do we, that the United Nations Commissioner had no jurisdiction to resolve boundary claims. Yet he did have jurisdiction to ensure Libya's internal unity and to defend it against external claims. And, so, acting on behalf of Libyan interests, as he saw them, the United Nations Commissioner for Libya, for example, strongly opposed views expressed by the French Minster of the Interior, M. Queuille, who was responsible for administering the Libyan Fezzan. When Queuille advanced the proposition that perhaps the people of the Fezzan province should have the right to choose to secede before independence (MC at p. 209 (E) (Fr.), para. 104 and Ann. 312) he was vigorously opposed by M. Pelt.

3. Equally firmly opposed by Pelt were indications by the Touareg population of Ghat that they would prefer not to remain as part of an independent Libya (MC at p. 208 (E), p. 234 (Fr.), para. 102 and Ann. 313) — there had been some representations to that effect by some of the Touareg. Those sorts of secessionist claims were opposed by the Commissioner backed explicitly by General Assembly resolution 289 (IV), which called for the respective regions to be administered to promote "Libyan unity" (MC, Ann. 307, Art. 10(b)). And members of the Assembly were united in their determination to bring to independence a Libya defined by its pre-existing Italian colonial boundaries, without any substations or substitutions. The substance of territorial integrity thus was something from which Libya derived considerable benefit and with which it was familiar.

4. The United Nations concern that Libya achieve its independence with its prior colonial boundaries and

territorial integrity intact was an early instance of the new law of decolonization as it was then evolving at the United Nations in practice. Libya was one of the very first to see the justice of applying the same normative practices to Chad when, a decade later, it achieved independence and became a United Nations member. And so indeed Libya did, welcoming Chad warmly and without a hint of discord to come.

5. It is also precisely the territorial integrity of Chad which was ratified by Libya in the 1955 Franco-Libyan Treaty. By 1960 there were two new nations. A common boundary — no problem. Territorial integrity, a notion absolutely central to the success of the decolonization enterprise, seemed to have won the day. Yet, today, Libya in its written pleadings scorns Chad's claim to its territorial integrity, for example, by quoting with approval the snide remark that Chad is only "an artificial by-product of its colonial history. But it is much more a product of Africa's and the United Nations determination to preserve those boundaries, that territorial integrity, which Libya in word and deed now scorns as "artificial". While these boundaries may have been drawn by colonial Posers unmotivated by the well-being of Africans, nevertheless, the well-being of Africans is now inextricably linked to those boundaries. Almost all other African and Arab States recognize this as a matter of practical necessity as well as a requisite of law.

6. Libya has an unresolved ambiguity about territorial integrity. On the one had it scorns the principle as the dead hand of colonialism, even though it itself derived considerable benefit from it, when claims were pressed against its territory by Egypt and France. On the other hand it nominally accepts *uti possidetis*. But Libya seeks to limit the doctrine's effect be restricting its application solely to uncontested territory and undisputed boundaries. A boundary is a boundary only when it is uncontested. That is Libya's version of territorial integrity. This cannot be an admissible caveat to *uti possidetis*. The essential purpose of that concept is to defend the territorial integrity and boundaries of new States as they stand at the moment of independence against challenge by other States. It is precisely to legitimize boundaries *likely to be challenged* that the rule was conceived in Latin American's decolonization and reinvigorated during the most recent decolonization of Africa.

7. Libya's independence, and Chad's, within colonially-established territorial boundaries is underwritten, as is the territorial integrity of all members, by Article 2 (4) of the United Nations Charter. Now Libya denies violating Chad's territorial integrity. It supports this denial by arguing that the area it invaded in 1973 was not really, not legitimately, Chadian. It does not contest that France was there in 1955. Yet, Libya would have us believe that territorial integrity does not apply because Libya has a territorial claim. But this is exceedingly

strange. Not only does it make *uti possidetis* essentially meaningless, it also makes it non-dispositive. Libya did not claim these territories when it became independent at the end of 1951 and again Libya did not claim these territories when they came under the sovereign authority of an independent Chad in 1960, nor when Chad joined the United Nations with Libya's blessing (CMC at pp. 151-154 (Fr.), paras. 4.52-4.58). Only in the 1970s did Libya begin to challenge the peaceful harvest of *uti possidetis*.

8. Of course the principles of territorial integrity and *uti possidetis* are not inapplicable merely because a State has an historic claim to the territory of another. But even if a claim to historic title could overrule the applicability of *uti possidetis*, Libya made no such claim at any of the critical times when such a claim might be expected to have been advanced. And if it were arguable that the claim against a colony's territorial integrity based on historic title could conceivably persist even after the colony's independence, that claim at least would have had to exist and be pursued publicly before and at the colony's coming to independence and joining of the United Nations.

9. The failure of independent Libya to advance such a claim in opposition to *uti possidetis* at the critical time of Chad's independence and admission to the United Nations is of course consistent with the pattern established earlier. These further silences of post-independence Libya must be understood as confirming France's earlier uncontradicted assertions to the General Assembly concerning Libya between 1948 and 1952. They must be seen to confirm Libya's agreement to its southern boundary as defined in the Treaty of 1955.

10. Mr. President, Members of the Court, we have remarked on how the new law of decolonization was first implemented for Libya's benefit. If Libya had thought that this new law of decolonization was inapplicable to Chad, would it have signed and ratified the 1955 Treaty? And would it not have had a duty to make this clear at the United Nations at the next critical moment in which that Organization was involved: that is, at the independence of Chad in 1960 and its entry into the United Nations? Surely, thinking of Chad in 1960, Libya must have believed either that it had a boundary, or else that it had a boundary dispute. It is impossible to deduce from Libya's warm and welcoming conduct at the United Nations that it believed itself to have not a boundary, but a dispute.

11. In 1960, there was no sign of Libya's later rebellion against the new law of decolonization. The two main features of this new law are *territorial integrity* (or *uti possidetis*) and *self-determination*. It is their meaning which is at the heart of this case. Chad's argument is straightforward: Chad came to independence entitled to boundaries which correspond to the "photograph" of the territory under French control which was

bequeathed to it, uncontested, that the time of its decolonization. The content of this entitlement had been clearly stated by France: frequently and publicly and clearly at the United Nations. It had been confirmed by Libya in the 1955 Treaty. Within the boundaries of this territorial entitlement, Chad's act of self-determination took place. Had Libya, nevertheless, wished to claim part of this territory or to seek recognition for a different boundary, the United Nations decolonization practised made clear how this could have been done at the critical moment of Chad's independence and admission to the United Nations. Territorial integrity was a right, but it was not irrebuttable. The new customary law of decolonization also made provision for seeking exemption in special circumstances. But Libya made no effort to seek such an exemption. That, surely, is evidence that Libya was satisfied with the normal operation of the applicable principles of decolonization and with the borders established in conformity with those principles.

II. The Independence of Chad at the United Nations

12. Mr. President, Members of the Court, let us look for a moment at Chad's decolonization. The United Nations did not supervise Chad's independence quite as closely as it had that of Libya, a decade earlier. Nevertheless, it did supervise the administration of all non-self-governing territories. From 1947 to 1959 France regularly submitted colonial reports to the Assembly (*idem.*, para. 4.56), including detailed information on Chad. In these, France asserted that what is not Chad covered territory which included the B.E.T. For example, in 1955, the very year the Franco-Libyan Treaty confirmed their mutual boundary, France stipulated in its report to the United Nations that Chad included 538,000 square kilometres specifically attributed to the B.E.T. (*idem* and cites therein.) That definition of the B.E. T. includes all the territory occupied by Libya in 1973. Now, this was no secret memorandum in the Quai d'Orsay files. Libya, as a Member of the United Nations, received these published reports. It might have been expected to complain, if, in 1955, it thought the French attribution to be extravagant, or if it had opposable territory claims. In the 1950s it was common practice for Member States to be quite harshly critical of unsavoury aspects of French colonial administration (*idem.*, paras. 4.57-4.58). Nevertheless, Libya did not dispute the territorial dimensions of Chad as reported by France; neither did it voice any claim to any part of the territory over which France was then still

exercising responsibility. It certainly did not tell the United Nations that its boundary was unclear or unresolved or that it needed technical assistance to figure out what rights it had had to an Ottoman doctrine of hinterland.

13. This silence by Libya is particularly significant in the light of the contemporary normative practice. In 1960, Chad reached it independence. By 1960, the United Nations had developed rules of decolonization which applied generally to territories moving towards independence. Alongside these had developed a practice of protesting their application in spacial cases. I shall shortly give some examples. Yet, here was Chad, moving towards independence, its territory defined and administered, and its boundaries defended by France, by the colonial régime. Here was the United Nations, insisting that Chad's independence occur within the prevailing normative parameters: self-determination, *uti possidetis* (or territorial integrity). Might one not have expected Libya, if it believed, back then, what it asserts now, to have called out: "Stop! Before we encourage France to hand over its authority to an elected government in Chad and before we admit Chad into the United Nations, let us push France and the authorities in N. Djamena to redress an old wrong and return to Libya to say anything remotely like that at the critical time? Is it not reasonable to infer that Libya was silent because it did not then imagine that it had any cause to seek exemption from the general rule of self-determination? Can we deduce that, in 1960, Libya was content within its existing borders, borders protected by the principle of territorial integrity?

III. The New Rules of Decolonization

14. As a Chamber of this Court has observed in the 1986 *Frontier Dispute* case, the principle of *uti possidetis* was embraced and universalized in the new law of decolonization so that independence would not lead to "fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power" (*I.C.J. Reports 1986*, p. 565). This rule, to quote the Court once more, "freezes the territorial title" in effect at independence; that is: "at the moment when independence is achieved . . ." (*idem* at pp. 566, 568; CMC at pp. 131-132 (fr.), paras. 4.12-4.14; and CMC at p. 152 (Fr.), para. 4.54). The same concern underlay the General Assembly's landmark Declaration on the Granting of Independence to Assembly's Countries and Peoples (the celebrated General Assembly resolution 1514 (XV) of 14 December 1960), passed in 1960 just as Chad was gaining its independence. I condemns any "partial or total disruption of the national unity and the territorial integrity of a country". The same norm of course is found again in the Assembly's 1970 Declaration on Friendly Relations (Declaration on Principles of International Law concerning Friendly Relations and

Co-Operation among States. General Assembly resolution 2625 (XXV) of 24 October 1970; CMC at pp. 132-133 (Fr.), para. 4.16). Libya, indeed, voted for both resolutions. (For discussion of General Assembly resolution 2625 (XXV). see CMC at p. 133 (Fr.), para. 4.17.) It did not say: these are good rules, but they do not apply to borders we dispute, or to territories as to which we have an unsettled claim.

15. In United Nations practice, the universality and prestige of the new law of decolonization meant that United Nations Members strove mightily to see that colonies became independent within the precise territorial boundaries as they were at the last phase of decolonization. The strength of this commitment can be seen by examining the resistance of the United Nations of the few applications that were made for exemption from the rules. Examining requests for exemption from rules gives us a glimpse of what Chad's transition from colony to nation might have looked like had there been a claim against it by Libya or even by the people of the B.E.T. under French rule.

16. These requests for exemption tended to be advanced in two situations. *One* was when it was claimed that self-determination ought to be applied so as to allow a coherent, ethnically distinct group within a colonial territory the opportunity to "opt out" before that dependency achieved independence. *The other* situation in which exemptions were sought was when all, or part, of a dependency advancing to independence was claimed, usually on the basis of historic title, by a State that was already a member of the United Nations, usually a neighbouring State. While the United Nations very rarely acceded to requests for exemption, such claims were not infrequent. Libya, as a Member of the United nations for almost a decade before Chad's independence, could scarcely have been ignorant of the practice because it was going on all around it.

17. First: the self-determination exemption. In 1960, a case for exemption based on self-determination, that is, self-determination of a sub-group within a colony, was not unimaginable. The claim to "opt out" might have been advanced by the people living in the B.E.T., or even by Libya on their behalf. It was not. Moreover, Chad's referendum of 1958 on self-determination, produced no movement for secession. In Chad's pre-independence election of 1959 there was participation throughout the B.E.T. and there were multiple parties, several of which succeeded in electing Members to the National Assembly. Professor Bowett, on 22 June, spoke of the total absence of evidence of acquiescence by the indigenous people in the so-called borderlands (CR 93/20, 22 June 1993, p. 19). But, *no*. By 1960, the people of the B.E.T., including those in Aozou, had exercised their right of self-determination. We can readily demonstrate this with 1959 election returns published in *Perspective Africaine* in Paris on 16 June 1959 which we have appended as Annex No. 107 to the

Counter-Memorial of Chad and which you see projected behind me.

Mr. President, Members of the Court, in this election, none stood for secession. This was in 1959. The next year, the duly-elected Chadian Assembly decided to declare the nation's independence. That, too, elicited no call to secede, not from the elected representatives and not from the people (CMC at pp. 135 (Fr.), para. 4.21 and cites therein, including CMC, Ann. No. 107).

18. Distinguished Members of the Court, it is always risky to profess what people thought 33 years ago. But we can make some deductions by contrasting the way self-determination worked in Chad to some very different contemporaneous experiences in other African colonies. For example, just as Chad was peacefully approaching independence within territorial boundaries unchallenged either domestically or internationally, Belgium was winding up its Trusteeship in Ruanda-Urundi. There, between 1959 and 1962, the two regions and populations, in several elections, expressed a clear preference for mutual secession over territorial integrity. After much initial resistance, the United Nations eventually gave the divorce its blessing just before independence — very reluctantly (CMC at pp. 133-135 (Fr.), paras. 4.19-4.20). The United Nations recognized the intensity of separatism in Ruanda-Urundi and agreed in that instance to a waiver of territorial integrity. The contrast between concurrent events in Chad and Ruanda and Burundi could not be more stark. The people of the B.E.T. expressed no desire to secede, Libya made no claim on their behalf, and so, of course, the prevailing United Nations rules applied. It would be disastrous, Mr. President, more than 30 years later, if the Court were to reopen and amend those carefully crafted rules and practices of decolonization.

19. Libya certainly knew how to play the self-determination card, if it had had one to play. Indeed, it was active in just such a case at the very same time as Chad was coming to independence. Libya played a major part in persuading the United Nations in 1960 to authorize a plebiscite that was to test the desire of the people in the Northern region of the British Cameroons to secede on independence and join neighbouring Nigeria (CMC at pp. 142-145 (Fr.), paras. 4.33-4.38 and cites therein). In effect, Libya helped the Northern Cameroons obtain an exemption from *uti possidetis* and territorial integrity. Its representatives knew precisely how to claim the exemption. Yet Libya made no effort to press France to hold a separate plebiscite in the B.E.T. comparable to the one it had successfully urged for the Northern region of the British Cameroons. At the critical moment, before Chad's independence, Libya made no case. True, the British Cameroons were a Trust Territory and Chad was a colony. But, by 1960, the General Assembly had largely obliterated the practical significance of that difference and was very actively supervising decolonization of the French territories in Equatorial and West

Africa. One must presume that Libya made no case because it did not then think that there was a case to be made.

20. Professor Bowett invites this Court to "take account of the contemporary emphasis on *people*, which is reflected in the law relating to human rights and self-determination of peoples" (CR 93/18, p. 71). Kindly as may be the intent behind this blandishment, Mr. President, you will be fully cognizant of the consequences which would follow — not least for "people" — if this Court began to redesign the boundaries of sovereign States to implement theories of what "people" want: particularly theories advanced by neighbouring Governments. Libya had presented this Court with petitions of persons living in the Aozou strip under its military occupation: the "Sudetenland" gamit. The Court surely will not now assist Libya to redefine Chad's territorial integrity or to re-examine its peoples' act of self-determination. These questions were resolved in 1930. None of the people of Chad, including those now under Libyan occupation, 30 years ago evinced any desire to secede. They did now ask to be consulted as a separate "people", distinct from all other Chadians. The democratic process by which Chad proceeded to independence is entitled to the same respect as that of any other Member of the United Nations. At no time during these events, while the General Assembly was reviewing French progress toward Chad's independence, did Libya seek to have the Assembly instruct France to bring Chad's borders and territorial status into accord with any claim of ethnic transnational ties. Neither the words "Ottoman" nor "Senoussi" ever appeared on the lips of Libya's United Nations representatives. Instead, what happened in 1960, on Chad's declaration of independence, is precisely what the *Western Sahara* Advisory Opinion later prescribed (CMC at pp. 139-140 (Fr.), paras 4.26-4.28): the implementing in another colony of "the principle of self-determination through the free and genuine expression of the will of the people of the territory" (*Western Sahara Advisory Opinion, I.C.J. Reports 1975*, p. 162, and see also paras. 52-54). No voice, neither Chadian nor Libyan, was raised to seek some other form of self-determination than that which was actually and very properly and democratically implemented.

It is surely irresponsible to ask this Court, as counsel for Libya did most recently on 22 June, to consult something called the "human factor" and to make a decision in 1993 based n what the people of the Aozou strip, or the whole of the B.E.T., might currently want. We have offered evidence that what all factions of the B.E.T. seem to have in common is that they do not hold themselves to be Libyan. Our *agent* was eloquent on that point. But what Quebec or Brittany or the east of Sri Lanka might want at any moment, in any event, is surely not a question to be addressed, or redressed, by this Court. Chad's act of self-determination in 1960 in fact

compares favourably with that of any new nation. But, ultimately, that, too, is not the point. This Court is not the place, and 1993 is not the time, to review the bona fides of Chad's act of self-determination. No one truly interested in the "human factor" could wish for a departure so fraught with chaos.

21. So much for self-determination. What about historic title? Again, there would have been time, in the late 1950s, when Libya might have pressed the United Nations to exempt the colony of Chad from the law of decolonization in deference to a claim of historic title. If Libya did have such a claim, it could have objected, at that time, to the application of *uti possidetis*. That might have been a time for Libya, led by a Senoussi King, to advance a claim based on its alleged role as successor to the Ottoman, Senoussi and Italian titles and claims. But this is the claim Libya advances now, in 1993. At the critical moment when such a claim to exemption from the modern law of decolonization might have been appropriate, while Chad was being prepared for independence and its progress monitored and debated in various United Nations Committees, and at the moment of independence, the Libyan Government said not an irredentist word.

22. In the Security Council, even as France was introducing the new applicant for membership and describing its territory as comprising an "immense trapezium" of approximately 1,300,000 square kilometres, including "the high jagged mountains of the Tibesti" (Mc at p. 298 (E), pp. 320-321 (Fr.), para. 116 and cites therein), Libya made no effort to be heard in contradiction. In the General Assembly, Libya's representative (Mr. Fekini), offered Chad, along with other new members, on behalf of the King of Libya, "his people and Government, our most sincere and warm congratulations . . ." (MC at p. 299 (E), p. 322 (Fr.), para. 120 and cites therein). He recalled "with great appreciation" the "spirit" of French decolonization even while criticized France — and this is not insignificant for a Government that is alleged to have been still under the influence of France — for its failure to be as enlightened in respect of its conduct towards Algeria. Had Libya at that time entertained any claim to part of Chad's territory — here was Chad arriving at the United Nations — would it not have thought this — its claim — to have been at least as worthy of mention as its objection to France's treatment of Algeria? Is Libya's silence not evidence that it did not, at the critical moment, believe itself to have a claim?

23. Just as the *Cameroons* case must have demonstrated to Libya how to make a case based on self-determination, so, too, there were plenty of instructive contemporary examples for Libya to follow had to wished to persuade the United Nations that Chad should not become independent until France had acknowledged, if not redressed, Libya's claim to parts of Chadian territory then under French administration and about to pass under Chadian administration. It would certainly not have been the only Member of the United Nations to claim such an exemption from the application of *uti possidetis*. Numerous claimants showed the way: vigorously and repeatedly asserting claims of historic title before United Nations bodies. These claimants, usually States next door to a colony, pressed their arguments not so much in the hope of getting a favourable decision from the United Nations — although the United Nations in fact has occasionally been sympathetic to such claims (see discussion of Spain and Argentina's claims against Britain in CMC at pp. 156-159 (Fr.), paras. 4.65-4.70) — but they pressed forward in order to preserve the claim's viability beyond the critical moment of the colony's independence and membership in the United Nations — beyond the moment of the freezing — beyond the moment when *uti possidetis* would take effect. These claimants, asserting and reasserting their historic title before United Nations forums, understood that silence implied assent to the new State, that it validated its territorial integrity, "froze" existing boundaries, and precluded subsequent efforts at non-consensual revision. Libya must have known this.

24. It is no mere matter of conjecture that Libya's silences betoken the absence of any claim at the critical moment of Chad's independence. All around it, other States were safeguarding their territorial claims as neighbouring colonies approached independence. A few examples will suffice (CMC at pp. 160-162 (Fr.), paras. 4.59-4.82 and cites therein) and I have tried to avoid those that touch personally on the experiences of Members of this Court. During the period 1955 to 1960, United Nations bodies heard Yemem claim the colony of Aden, Guatemala the colony of Belize, Spain and colony of Gibralter, Morocco the colonies of Mauritania and Western Sahara, and Indonesia the colony of West Irian. At the very time Libya was congratulating Chad on its independence, and supporting its admission to the United Nations, Morocco was vociferously asserting its historic, ethnic and geographical title to Mauritania and ferociously opposing its bid to join the United Nations. It was doing this, it said, "to safeguard our position internationally" (CMC at pp. 161-162 (Fr.), paras. 4.73-4.75 and cites therein). And what was Libya doing? Libya was actually actively supporting Morocco in its opposition to Mauritania's application for membership. If Libya at that time had thought that it had an historically and ethnically-based claim on the B.E.T. similar to Morocco's on Mauritania, would it have

welcomed Chad to membership even as it was helping Morocco lock out Mauritania? Would it not have sought to safeguard its legal position, like Morocco, by stating it repeatedly, while opposing Chad's membership in the United Nations?

25. It makes no difference that Morocco, then, claimed all of Mauritania while Libya, now, claims "only" about half of Chad. Were that a significant point of distinction, the Court might consider, instead, the case of Somalia's entry into the United Nations. With great passion and frequent reiteration, Somalia sought to prevent the "freezing" of its borders at the critical moment and to preserve its claim to parts of Ethiopia and Kenya (MC at pp. 95-96 (E), pp. 155-156 (Fr.), paras. 4.60-4.64). Even as it sought membership in the United Nations, Somalia forcefully expressed to the Assembly its well-known view that its borders on independence did not satisfy — what — General Assembly resolution 392 (V), our old friend, that is, the very resolution on which Libya now relies, but *now* relies, in justifying its claim to Aouzou. Libya was there when Somalia demonstrated how to seek to preserve a claim of historic title, despite the new law of "photograph", despite the "freezing". Is it not at least indicative that, inf ace of all this practice, with its obvious legal intentionality, Libya said absolutely nothing?

IV. When Libya ought to have stated its case, if it had one

26. Mr. President, there were three critical moments:

(i) in December 1951 or February 1952, at the moment of Libya's declaration of independence and its recognition by the General Assembly;

(ii) in 1955, at the conclusion of the Franco-Libyan Treaty;

(ii) in 1960, on Chad's independence and application to join the United Nations.

At all, or any, of these occasions Libya had both the opportunity and a duty to speak up, if it had believed, at the critical moment, that the new law of decolonization — with its elements of self-determination within those existing colonial units that were legitimized by *uti possidetis* — that those rules should not apply for special reasons to Chad. It seems as if everyone else with such an unsatisfied claim was speaking up. That Libya did not do so suggests that it had no such claim, not at those times. Consequently, it cannot hope, *nunc pro tunc*, to use this Court to substitute its judgment *now* for that of the international community in 1960, not, at least, in the absence of a showing of fraud or some major irregularity at those critical moments. Mr. President, distinguished Members of Court, I shall seek to demonstrate that, when Libya did decide to assert a claim to

part of Chad, it knew this: it knew that its legal claims had long been waived, and that there was no rule upon which it could rely except the rule of force, and so it chose to argue not from law but from power.

Thank you, Mr. President, for your patience and indulgence in hearing me, and if I may I would propose that you might call on my associate, Professor Sorel.

The PRESIDENT: Thank you very much, Professor Franck. Professor Sorel.

M. SOREL : Monsieur le Président, Messieurs les juges,

C'est un immense honneur de me présenter pour la première fois devant vous et j'espère que vous me pardonnerez les imperfections dues à mon émotion et à ces premiers pas. Ceci aura un avantage, Monsieur le Président, je serai bref.

1. Je succède à M. Franck pour aborder un autre aspect fondamental des effectivités qui prouvent l'existence d'une frontière confirmée après les indépendances. Mon prédécesseur à cette barre a évoqué la reconnaissance internationale de cette ligne aux Nations Unies ainsi que les acquiescements successifs de la Libye. Pour ma part, je souhaiterais brièvement décrire les effectivités tchadiennes après l'indépendance de cet Etat à travers deux aspects complémentaires :

Tout d'abord, la souveraineté territoriale exercée par le Tchad sur la bande d'Aouzou à la suite de la succession d'Etats.

Et d'autre part, l'activité conventionnelle entre le Tchad et la Libye postérieure à l'indépendance du Tchad.

2. Les deux aspects confirment que le Tchad a exercé sur la bande d'Aouzou une souveraineté effective jusqu'à l'invasion par la force de celle-ci par la Libye et que rien dans l'activité conventionnelle ne permet d'affirmer l'inexistence d'une frontière comme l'affirment nos contradicteurs.

I. La souveraineté territoriale exercée par le Tchad à la suite de la succession d'Etats

3. Je voudrais aborder, Monsieur le Président, Messieurs les juges, le premier point concernant la souveraineté territoriale exercée par le Tchad à la suite de la succession d'Etats. Le Tchad est un Etat souverain et indépendant depuis le 11 août 1960, et depuis cette date, le Tchad a entendu exercer toute l'étendue de ses compétences souveraines sur l'ensemble de son territoire. L'accession du Tchad à l'indépendance fut sans doute une occasion de se réjouir en Afrique comme le soulignent nos honorables contradicteurs mais toutes les accessions à l'indépendance sont une occasion de se réjouir, et ceci n'empêche pas de préciser certaines revendications ou d'élever certaines protestations lorsque celles-ci existent. A cette époque, la Libye est

indépendante depuis presque neuf ans et malgré son dénuement relatif maintes fois rappelé par la Partie adverse, celle-ci était tout de même en mesure de rédiger une note de protestation si elle lui paraissait nécessaire. Elle s'en est abstenue.

4. Lors de son indépendance, le Tchad a succédé à la France et les faits montrent clairement que, à cette époque, la partie du territoire tchadien dénommée depuis lors "bande d'Aouzou" est demeurée soumise à l'autorité *effective* et *exclusive* du successeur de la France, c'est-à-dire la République du Tchad. Il existe alors un phénomène de continuité avec la France puisque cet Etat, conformément au tracé confirmé en 1955 avait jusqu'en 1960 exercé tous les attributs de la souveraineté jusqu'à la frontière méridionale de la Libye. Traités et effectivités se confondaient en toute logique puisque la Libye, la France, puis le Tchad reconnaissent l'existence de la même ligne frontalière.

5. Les effectivités du Tchad sont nombreuses, encore que "proportionnées" — si l'on peut dire — à la situation particulière du BET, et correspondent à l'exercice "classique" des compétences d'un Etat sur son territoire. Il convient d'évoquer rapidement ces actions (les écritures du Tchad détaillent ces aspects, mémoire du Tchad, chap. VI, p. 293 et suiv.) en les regroupant par thèmes. Je vous prie, par avance, de bien vouloir m'excuser pour ce rappel un peu descriptif, surtout à une heure si tardive de la matinée, mais il convenait de couper court à certaines insinuations de la Partie adverse. En effet, comme le rappelle la Chambre de la Cour dans l'affaire du *Différend frontalier* entre le Burkina Faso et le Mali :

> "Dans le cas où le fait correspond exactement au droit, où une administration effective s'ajoute à l'*uti possidetis juris*, l'effectivité n'intervient en réalité que pour confirmer l'exercice d'un droit né d'un titre juridique." (*C.I.J. Recueil 1986*, p. 586-587, par. 63.)

Ce sera le but de ma brève démonstration, mais si l'on admet — et seulement *si* — comme l'affirme la Libye, qu'il n'existe pas de titre juridique — ce que le Tchad récuse — alors je me permets de poursuivre ma citation pertinente dans l'affaire du *Différend frontalier*; en effet, la Chambre de la Cour précise :

> "Dans l'éventualité où l'effectivité ne coexiste avec aucun titre juridique, elle doit inévitablement être prise en considération." (*Ibid.*)

C'est donc, en quelque sorte, à double titre que ce rappel est nécessaire.

6. Tout d'abord, le Tchad exerce, à partir de 1960, une autorité administrative — au sens général — sur la région du BET, qui est devenue une préfecture divisée en trois sous-préfectures. Certes, jusqu'en 1965, ce sont des officiers français qui exerceront certaines hautes fonctions administratives mais ceci résulte d'accords de défense et d'assistance technique et militaire conclus entre le Tchad et la France en août 1960 et d'autre part, les officiers français étaient nommés par le Gouvernement tchadien et ne recevaient d'instructions que de celui-ci

(mémoire du Tchad, p. 303, par. 37-38). Il n'y a donc pas continuité d'une occupation militaire comme l'insinue la Libye dans son contre-mémoire, (contre-mémoire de la Libye, par. 5.107) mais simplement, la "continuité des hommes" d'imposait pour des raisons évidentes et très concrètes en attendant la formation de cadres tchadiens (ce qui sera effectif après 1965). De plus, l'utilisation par un Etat, d'organes d'un autre Etat, que ce dernier met à sa disposition, est un phénomène bien connu en droit international, comme a eu l'occasion de le souligner M. Ago dans son rapport sur la responsabilité des Etats (cf. R. Ago, Troisième rapport sur la responsabilité des Etats, *Annuaire de la Commission du droit international*, 1971, vol. II, 1ère partie, nos 198-214). On peut donc noter une présence continue d'un personnel administratif dans les sous-préfectures du BET jusqu'en 1968 (mémoire du Tchad, p. 304, par. 41, qui indique la liste des préfets et sous-préfets). A ce moment, la Libye n'émet strictement aucune protestation contre cette présence effective (contre-mémoire du Tchad, par. 2.100-2.101, 4.44).

7. Cette présence du Tchad va se traduire par des manifestations concrètes qui sont communes à tous les Etats sur leur territoire. Ainsi, des élections auront lieu dans le BET, y compris dans la bande d'Aouzou, le 4 mars 1962, sous le contrôle du Gouvernement tchadien, ou encore, selon les rapports du Bulletin politique mensuel du sous-préfet du Tibesti, les impôts seront régulièrement perçus.

8. Significatif également est l'exercice d'une activité de police sur la région, et ceci malgré des difficultés et des imperfections dues à la situation géographique (mémoire du Tchad, p. 313, par. 76). Cette activité comprenait aussi bien la surveillance de la frontière que l'arrestation de bandits. Il est, par exemple, fait mention de la présence d'un inspecteur de police à Aouzou en 1968, et ceci dans la correspondance du préfet du BET (mémoire du Tchad, p. 319, par. 107).

9. L'un des rôles de ces fonctionnaires de police ainsi que des forces armées était également le contrôle des mouvements de population à travers la surveillance aussi bien des laissez-passer exigés pour les déplacements individuels que du permis de transhumance. D'une manière très significative, le préfet du BET exigera en 1964 des passeports munis d'un visa de séjour au Tchad pour les ressortissants libyens et ceci fut signifié au chef de poste de Zouar et visait les ressortissants libyens, particulièrement ceux "de la zone nord de la ligne frontalière" (mémoire du Tchad, annexe 126). Dès 1965, le sous-préfet du Tibesti réclamait également la mise en place de bureaux de douane dans les principaux centres habités (Wour, Aouzou, Bardaï et Yebibou — cf. mémoire du Tchad, annexe 120). Ceci accrut l'efficacité des autorités pour les arrestations de contrebandiers dans la zone frontalière.

10. Etroitement lié à cette dernière activité, le recensement de la population, déjà actif sous l'administration française (mémoire du Tchad, p. 279, par. 269-271) fut poursuivi par les autorités tchadiennes et ceci malgré les difficultés résultant de nomadisme qui rendent cette comptabilité quelque peu aléatoire comme le mentionne un rapport du sous-préfet du Tibesti en juin 1966 (mémoire du Tchad, p. 306, par. 51).

11. Enfin, s'il est un domaine qui permet de contrôler l'autorité effective d'un gouvernement sur la population, c'est bien celui de l'enseignement et de l'éducation. De nombreux efforts furent entrepris pour la scolarisation (mémoire du Tchad, p. 310, par. 68), celle-ci étant liée au développement de l'état-civil et plus généralement de l'"esprit civique" (mémoire du Tchad, p. 307, par. 53). Il s'agissait, malgré les difficultés, d'intéresser les Tchadiens aux exigences de la bonne administration d'un Etat moderne. Dans ce but, des "tournées de contact" (c'est l'expression qui est alors employée) avec la population étaient organisées. Les recensements de la population scolarisée sont d'ailleurs parmi les plus précis et l'on apprend ainsi qu'en 1966, l'effectif des élèves de la cantine d'Aouzou est d'une vingtaine d'enfants mais peut aller jusqu'au trente ou quarante enfants selon les déplacements de la population (mémoire du Tchad, p. 317, par. 100). La liste des écoles est également tenue à jour et Aouzou et Zouar sont mentionnés dans les rapports de 1970 et 1971. On y apprend même quelles sont les écoles qui ont dû fermer à cause de la rébellion ! Ce qui prouve que pour le Tchad, il n'était pas question de renoncer à une partie de son territoire mais au contraire de lutter contre une situation à laquelle il fallait remédier.

12. Un autre domaine vient confirmer les effectivités du Tchad : c'est celui du développement économique. Ainsi, dans le domaine de la recherche des hydrocarbures, un permis fut délivré, par exemple, en 1961 à une société française pour une prospection dans la zone de la bande d'Aouzou (mémoire du Tchad, p. 313, par. 80). Celle-ci se révéla infructueuse mais la délivrance de ce permis est tout à fait significative. En effet, c'est le 31 octobre 1961 que le ministre tchadien des travaux publics accorde un permis exclusif de recherches d'hydrocarbures liquides ou gazeux (n° 189/PC-TPMHH, *Journal Officiel de la République du Tchad*, le 15 novembre 1961, p. 468-69) à la société de participations pétrolières PETROPAR. Ce permis fut octroyé pour une période de cinq ans renouvelable et portait sur une superficie de 152 000 km^2 à l'extrémité nord-est de l'Ennedi, limitée au nord par la frontière de la Libye et à l'est par la frontière du Soudan. Dans le but de prospecter, la Société PETROPAR fit aménager un aérodrome privé près de Tekro, dans l'Ennedi, ce qui amène également la création d'un poste de gendarmerie (*Journal Officiel de la République du Tchad*, 15 octobre 1963, p. 567). Cette activité prouve que le Tchad exerçait des attributions gouvernementales sur la

région et la Libye ne protesta pas. Est-il besoin de dire que, pour sa part, ce pays ne délivra, bien sûr, aucun permis de ce type !

13. De même, on tenta de développer l'agriculture durant la période allant de 1960 à 1966, le sous-préfet du Tibesti signale dans un bulletin économique le jaillissement d'une source à ... Aouzou ! Le développement d'infrastructures touristiques fut également envisagé. Ceci est resté sans suite. Finalement, aucune activité économique n'a pu se développer dans la région de la bande d'Aouzou et en général dans le BET après l'indépendance du Tchad, les difficultés rencontrées étant trop importantes (isolement géographique, zone désertique...). M. Cassese a déjà évoqué ces points. Un simple véhicule indispensable au commerce dans une zone si vaste représente un bien rare et précieux (mémoire du Tchad, p. 305, par. 44). Mais ceci importe peu dans le cadre du présent litige. Ce qui importe, c'est que le Tchad exerçait sur tout le BET — y compris, j'insiste, sur la bande d'Aouzou — des droits de souveraineté exclusifs.

14. Cette situation globale nous conduit à insister sur un point déjà évoqué par M. Cassese : on ne peut s'attendre à une activité administrative "intense" dans une région aussi déshéritée et peu peuplée. Les effectivités doivent donc être envisagées en fonction de cette situation selon un critère que je qualifierais de proportionnalité. La Cour reconnaît d'ailleurs dans sa jurisprudence constante aussi bien dans les affaires (*Groenland oriental, C.P.J.I. série A/B n° 53*, p. 48; *Minquiers et Ecréhous, C.I.J. Recueil 1953*, p. 47; *Sahara occidental, C.I.J. Recueil*, p. 46-47). Mais surtout, lorsqu'un titre est reconnu à un Etat et qu'une frontière est établie — ce qui est le cas du Tchad — il n'est pas nécessaire d'exiger des manifestations importantes de souveraineté. Chaque Etat est libre en fonction de ses données géographiques, politiques et sociales de manifester sa souveraineté comme il l'entend avec l'intensité qu'il souhaite à l'intérieur de ses frontières.

15. A partir de 1968, le contrôle d'une partie du BET échappe à l'administration centrale du Tchad. L'armée tchadienne quitte le poste d'Aouzou en 1968 à la suite de la révolte des gardes nomades (mémoire du Tchad, p. 34, par. 77). Le Tchad entre alors dans une "zone de turbulences" qui durera plus de vingt ans, et le BET va devenir la base de mouvements successifs en révolte contre l'autorité centrale (c'est le cas du Frolinat du docteur Abba Sidick ou des forces armées du nord d'Hissène Habré et Goukouni Oueddei). C'est aussi la période qui marque le début des revendications libyennes en 1971 (à travers une carte touristique) avant l'invasion armée de la région en 1973. Il y a lieu, à cet égard, de noter l'étrangeté de l'argument libyen qui justifie de tels actes par une menace sur sa sécurité au sud à cause des rébellions au Tchad (mémoire de la Libye, par. 3.07) et pour protéger l'exploitation de son pétrole au nord de la zone frontalière (mémoire de la

Libye, par. 5.538). La Libye entretient à ce propos la confusion. La rébellion au nord du Tchad qui n'a aucun but sécessionniste ne signifie pas que l'Etat tchadien renonce à y exercer une autorité effective. Au contraire, c'est tout l'enjeu de la lutte qui va avoir lieu alors que la Libye, attisant par des aides diverses cette lutte, souhaite y voir un renoncement qui n'existe pas.

16. Toutes les manifestations décrites constituent néanmoins les signes indiscutables de la présence des autorités tchadiennes après l'indépendance dans la zone objet du litige. Ceci indique non moins clairement que la frontière derrière laquelle s'exerçaient ces effectivités était délimitée et acceptée comme telle par les deux Etats. Ceci n'est d'ailleurs pas surprenant et correspond au principe ferme du droit international selon lequel un changement dû à une succession d'Etats n'affecte pas le statut d'un traité de frontières. Les frontières du Tchad sont "héritées" de l'entité dont le nouvel Etat faisait auparavant partie. Et la frontière ayant été confirmée sans ambiguïté par le traité du 10 août 1955, l'absence de revendications ou même de protestations de la Libye jusqu'en 1971 est tout à fait logique et conforme au droit (contre-mémoire de la Libye, par. 2.04). Les frontières possèdent un caractère objectif opposable à tous et ce principe est respecté par tous, y compris les Etats qui sont plutôt favorables à la "table rase" en matière de succession.

17. La conclusion de ce bref exposé sur ce premier point est simple : le titre incontestable que le Tchad tire du traité du 10 août 1955 est fidèlement reflété sur le terrain par la présence effective des autorités tchadiennes. Il y a là une coïncidence qui n'est évidemment pas le fruit du hasard.

Le titre territorial incontestable du Tchad sur la région revendiquée par la Libye est de nouveau confirmé par l'étude des relations conventionnelles entre les deux Etats postérieurement à l'indépendance du Tchad.

C'est le deuxième point, Monsieur le Président, Messieurs de la Cour, que je souhaiterais aborder dans ma brève plaidoirie.

II. L'activité conventionnelle entre le Tchad et la Libye postérieurement à l'indépendance du Tchad

18. Les relations conventionnelles entre le Tchad et la Libye postérieurement à l'indépendance du Tchad confirment, malgré la guerre civile, malgré les troubles de l'époque, la cohérence de l'attitude tchadienne et la conviction des deux pays qu'une frontière existe et a toujours existé et qu'elle demeure celle qui avait été définie avant l'indépendance du Tchad. Un survol rapide des différents accords permet de le confirmer.

19. Le 2 mars 1966 fut conclu à Tripoli un accord de bon voisinage et d'amitié (mémoire du Tchad, annexe 15) qui organise la circulation de la population installée de part et d'autre de la frontière ainsi que le trafic commercial et caravanier entre les deux pays. Cet accord confirme les relations frontalières paisibles

entre les deux Etats et il ne paraît guère réaliste de conclure un tel accord s'il existe un litige sur le tracé de la frontière et, a fortiori, s'il n'y avait pas de frontières (mémoire du Tchad, p. 33, par. 75). Ceci confirme que le traité de 1955 est considéré comme la bonne référence par les deux Etats. Sans entrer dans le détail de cet accord, il convient, Monsieur le Président, de citer l'article 1er, alinéa 1 :

> "Sur la *frontière* séparant le territoire du Royaume-Uni de Libye de celui de la République du Tchad, les Gouvernements libyen et tchadien prendront toutes mesures en vue d'assurer le maintien de l'ordre et de la sécurité par une liaison et une coopération de leurs services de sécurité." (Les italiques sont de nous.)

"Sur la frontière", Monsieur le Président, et ce n'est pas une expression isolée dans ce traité puisque les articles suivants font également référence à la frontière. Ainsi l'article 2 est très instructif (c'est le document n° 1 que vous trouverez dans votre dossier de plaidoiries) puisqu'il mentionne les "populations installées de part et d'autre de la frontière à l'intérieur de zones géographiques" et ces zones géographiques situent sans ambiguïté Zouar, Largeau et Fada au Tchad. Ces trois localités se trouvent, bien sûr, dans le BET très au nord de la ligne revendiquée par la Libye dans ses écritures. De même, l'article 4 impose la création de "cartes de circulation frontalières". Enfin l'article 7 mentionne les mesures que devront prendre les "autorités frontalières".

Ces références ne sont pas anodines d'autant qu'il n'est fait nulle mention de frontière à délimiter dans ce traité, ce qui tend à prouver que celle-ci était déjà délimitée dans l'esprit des signataires. On utilise très simplement une délimitation existante dans le cadre d'une coopération transfrontalière. L'accord de 1966 est donc clairement conçu sans que soit exprimé le moindre doute sur les compétences souveraines des Parties sur leur territoire. Il en découle que, pour les deux pays, la frontière est située à l'intérieur de la zone instituée par l'accord.

20. Les accords suivants s'inscrivent dans un contexte différent puisque, comme je l'ai signalé, à partir de 1968 s'ouvre une période plus troublée pour le Tchad. La Libye, dans ses écritures et lors de ses plaidoiries, affirme à plusieurs reprises que le Tchad serait resté silencieux sur la question frontalière à partir de 1972 et que ce silence est inexplicable si ce pays avait souhaité émettre des protestations contre l'occupation de la bande d'Aouzou. J'ouvre une parenthèse, une petite parenthèse, Monsieur le Président, pour signaler à la Partie adverse qu'elle n'hésite pas à utiliser cet argument pour affirmer, lors de ses plaidoiries, qu'en 1960 il n'existait aucune obligation juridique pour la Libye de formuler une objection au moment de l'indépendance (CR 93/18, p. 30). La contradiction est évidente mais je ferme cette parenthèse.

Monsieur le Président, ce n'est pas de "silence" qu'il s'agit mais de "prudence". En effet, comme le démontrera le professeur Higgins après moi, la prudence qui transparaît dans ces accords ne doit pas être

confondue avec un renoncement. De nombreuses relations bilatérales entre les deux Etats découlant de ces accords attestent d'une activité diplomatique qui exprimait clairement les protestations du Tchad. Alors pourquoi une telle prudence dans ces accords ? Il est tout à fait clair, et pourquoi ne pas le dire, que le Tchad redoutait les représailles de son voisin du nord de plus en plus menaçant. Il a dès lors cherché à éviter un affrontement direct et c'est dans ce contexte qu'il faut comprendre les accords suivants. Certes, ou comme l'affirme M. Cahier (CR 93/18, p. 40), on peut estimer que le droit international ne se soucie pas des arrière-pensées des hommes d'Etat même si, comme l'affirmait Paul Valéry : "Les seuls traités qui compteraient seraient ceux conclus entre les arrière-pensées." (*Regard sur le monde actuel.*) Mais les textes juridiques ne sont jamais isolés et dénués de fondements. Les sources matérielles, le contexte, les conditions spécifiques d'une époque donnent tout à leur sens à des déclarations et traités. Les "circonstances dans lesquelles le traité a été conclu" font partie des moyens complémentaires d'interprétation selon l'article 32 de la convention de Vienne sur le droit des traités. Je ne reviens pas sur les conséquences juridiques de ces dispositions, M. Cot s'est exprimé largement déjà sur ce sujet (CR 93/22, p. 24). C'est donc bien la prudence, justifiée par le contexte spécifique de l'époque, qui caractérisent ces accords, et non le silence ou le renoncement. Le Tchad a-t-il renoncé ? Absolument pas. Et nous allons le voir.

21. Je m'abstiendrai de m'étendre sur la "lettre Tombalbaye" (mémoire du Tchad, annexe 343) dont la Libye fait grand cas, M. Pellet évoquera cet aspect ultérieurement. De toute façon, cette lettre, si elle existe, ne constitue pas un accord et n'intéresse donc pas l'étude des relations conventionnelles durant cette période.

22. Le traité d'amitié, de coopération et d'assistance mutuelle entre le Tchad et la Libye du 23 décembre 1972 se situe dans ce contexte particulier. Le régime tchadien est affaibli par la rébellion au nord et face aux menaces libyennes (la carte de 1971 est un présage), le président Tombalbaye cherche à éviter l'affrontement. Après une brève crise, les relations diplomatiques sont renouées en avril 1972 et le Président tchadien en visite à Tripoli du 20 au 23 décembre, visite durant laquelle sera signé le traité, cherche donc l'apaisement mais ne renonce absolument pas face aux prétentions libyennes. La lecture du traité en apporte la preuve puisqu'il n'y est fait aucune mention de la question des frontières et que le traité se borne à une série de déclarations fort vagues sans grand intérêt d'ailleurs pour notre affaire. La question, en fait, sera évoquée peu après et le Tchad protestera fermement lors de rencontres bilatérales dans le cadre d'une commission conjointe prévue à l'article 4 du traité. Cet aspect sera développé par le professeur Higgins.

23. Si nous remontons dans le temps, nous nous apercevons qu'à la suite d'une visite du colonel Kadhafi à

N'Djamena en mars 1974 (mémoire du Tchad, annexe 35), fut signé l'accord du 12 août 1974. Celui-ci est marqué par le même esprit que l'accord de 1966. Certes, l'article 2 aborde la question des frontières (c'est le document n° 2 que vous trouverez dans votre dossier) pour y signaler que celles-ci "s'inspirent d'une conception coloniale à l'élaboration de laquelle les deux peuples et nations n'ont pas participé". Il n'est guère nécessaire d'effectuer une analyse approfondie de cette phrase pour s'apercevoir qu'on ne mentionne pas une conception coloniale des frontières dont la remise en cause nécessiterait une nouvelle délimitation mais on mentionne simplement que des "frontières" *existantes* s'inspirent, à l'origine, d'un partage colonial auquel les deux peuples "n'ont pas participé". C'est vrai — du moins pour le Tchad — et c'est d'ailleurs le cas de la grande majorité des Etats africains. Il faut tout de même remarquer, à cet égard, que c'est la Libye indépendante qui a conclu le traité de 1955. C'est un privilège rare sur ce continent. Bref, il ne s'agit là que d'un regret par rapport à une situation antérieure dont, *a contrario*, l'existence est reconnue et non d'une modification de cette situation. La frontière existe indépendamment de la conception coloniale qui l'a motivée et façonnée. Il paraît, dès lors, pour le moins difficile d'affirmer que ceci est l'expression d'une absence de frontière ou de l'absence de sa délimitation comme le fait la réplique libyenne (réplique de la Libye, par. 11.25).

Le différend concernant l'occupation libyenne était plus que jamais présent et, encore une fois, les Tchadiens n'avaient pas renoncé. De nouveau, cet accord doit être simplement replacé dans son contexte. Le Tchad est en proie à de graves troubles internes (le président Tombalbaye sera renversé peu de temps après) et devait "temporiser"et donner quelques gages à son voisin à l'affût, mais, j'insiste, Monsieur le Président, en marge, les négociations ont continué au sein des commissions instituées par les accords. D'ailleurs parallèlement à la conclusion de cet accord, une mission tchadienne est à Tripoli pour aborder cette question de l'occupation de la bande d'Aouzou.

24. Si nous remontons encore plus loin dans le temps, nous arrivons au traité d'alliance et d'amitié du 15 juin 1980 (mémoire de la Libye, annexe 37) ce traité est conclu en pleine guerre civile. La confusion est à son comble et ce traité offre à la Libye le prétexte qu'elle attendait pour s'ingérer officiellement dans la guerre civile. Quelle valeur lui donner lorsque l'on sait que ce traité fut signé du côté tchadien par un membre d'une des factions rivales, et que celui-ci n'exerçait aucune fonction gouvernementale officielle ? Face à cette situation, comment donner foi à l'argument de nos contradicteurs lorsqu'ils affirment dans leurs écritures (mémoire de la Libye, par. 5.565) qu'un tel traité n'aurait pu intervenir si une occupation illicite d'une partie du territoire avait été reconnue ? Pourtant, dans cet accord comme dans celui de 1974, la liberté de circulation entre les

deux Etats est évoquée, ce qui présuppose l'existence d'une frontière et d'une autorité administrative de chaque côté de la frontière. On peut en conclure que l'on reconnaît donc l'existence d'une frontière qui — faute de précisions contraires — correspond bien à celle confirmée par le traité du 10 août 1955.

25. Enfin, Monsieur le Président, Messieurs de la Cour, il convient de mentionner le communiqué conjoint entre le Tchad et la Libye du 6 janvier 1981, communiqué dit "accord de fusion" (la Libye est coutumière de ce type d'accord). Le contenu de ce communiqué est très virulent et y sont dénoncées, par exemple, les tentatives "impérialo-sionisto-réactionnaires appuyées par le colonialisme" (art. 6, mémoire de la Libye, annexe 38) dans le but de déstabiliser la région. Le ton est donné... Néanmoins, et malgré ce discours virulent, un article de ce communiqué est significatif. M. Cahier citait dans sa plaidoirie (CR 93/18, p. 17) deux articles (8 et 10) de ce texte. Je me permettrai de poursuivre pour évoquer l'article 11 (c'est le document n° 3 que vous trouverez dans votre dossier) qui, dans le but de réaliser la "fusion" entre les deux peuples, décide "d'ouvrir *les frontières*" entre les deux Etats. Des frontières existent donc et comme ce communiqué n'aura aucune suite et que la "fusion" ne sera jamais réalisée, on peut donc en déduire que les frontières qui devaient être ouvertes existent toujours. D'ailleurs, il faut également remarquer qu'ouvrir une frontière ne revient pas à la supprimer. Ce projet de fusion sans caractère exécutoire, dénoncé avec indignation par la communauté internationale et les chefs d'Etats africains (contre-mémoire du Tchad, annexe 129) et reflétant une simple déclaration d'intention — comme ceci sera très rapidement reconnu par le Tchad — reste, par défaut, tout à fait instructif. Il s'agissait de parvenir à ouvrir des frontières qui étaient considérées comme une réalité en 1981 par les deux Etats.

26. Il n'y aura plus de relations conventionnelles entre ces deux Etats jusqu'à l'accord-cadre d'Alger en 1989 (mémoire du Tchad, annexe 17) qui prouve sans ambiguïté qu'il y a un différend à régler, ce différend étant l'objet même de l'accord.

27. Pour conclure, Monsieur le Président, Messieurs de la Cour, on peut affirmer qu'il y a bien une continuité et une constance dans l'attitude du Tchad, mais contrairement à ce qu'affirme la Libye, il ne s'agit pas d'une continuité couvrant la période de 1972 et à 1983 (réplique de la Libye, par. 11.32) mais d'une continuité qui part de l'indépendance du Tchad en 1960 jusqu'à l'accord-cadre en 1989. En effet, si l'on étudie de près ces accords une fois de plus — y compris ceux de la période "troublée" — rien n'indique un quelconque acquiescement tchadien à la présence libyenne dans la bande d'Aouzou ni, a fortiori, à une absence de frontière avec la Libye. Au contraire, malgré le jeu des alliances tournantes, le Tchad a toujours gardé le souci de recouvrer sa souveraineté sur l'ensemble de son territoire, comme cela a été nettement exprimé lors des

négociations bilatérales avec la Libye. Cette attitude a le mérite de la clarté et de la continuité. Et la présence du Président de la République du Tchad le premier jour devant votre Cour prouve la constance de l'attitude de cet Etat. Lorsque la Libye précise dans ses plaidoiries : "C'est ... au fur et à mesure d'une meilleure connaissance du dossier que la Libye précisera des revendications" (CR 93/14, p. 32), il y a de quoi s'étonner. Quarante ans (de 1951 à 1991) pour savoir ce que l'on souhaite, c'est long ! Dès 1960, le Tchad connaissait ses frontières et l'étendue de son territoire.

28. Le Professeur Higgins va désormais s'exprimer sur un aspect complémentaire à ma brève plaidoirie. Je vous saurais gré de lui donner la parole sans doute demain et vous remercie, Monsieur le Président, Messieurs de la Cour, de votre bienveillante attention.

Le PRESIDENT : Thank you very much, Professor Sorel. So we will meet again tomorrow morning at 10 o'clock.

L'audience est levée à 13 h 5.

CR 93/26

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Friday 2 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le vendredi 2 juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Ranjeva
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajibola
	Herczegh
Judges *ad hoc*	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahuriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent,

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel.

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzuti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel,

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Professor Higgins.

Professor HIGGINS:

The Reactions of Chad to the Libyan Occupation

1. Mr. President, Members of the Court: I address you this morning on the question of the reactions of Chad to Libyan interference and occupation. Mr. President, Professor Cahier has put it to you that the events and facts of the period 1966 till the present show that either Chad accepted that the Aozou strip blonged to Libya all alog or that it early abandoned any misconceived ideas it might have had as to its rights (CR 93/18 Jun, p. 48). Of course, Libya is meant to be showing the Court that no frontier existed, not that Chad knew the frontier to be south of the Aozou strip ? but no matter. It all serves to distract from the simple point that the 1955 Treaty affirmed with France the 1899 line as the common frontier with Chad.

2. But in any event, the argument is not sustainable when one begins to look at the facts ? *all* of the facts, not a careful selection of them. What are the facts? Libya, having entered into the 1955 Treaty, came under a new government in 1969 and then embarked upon a new policy. It started giving financial and material assistance to rebl elements. It moved first by silence, infiltrating the Aozou strip and circulating from 1971 maps showing the 1935 line. By 1973 Libya was installed at Aozou and was publicly invoking the 1935 frontier line at the United Nations. By 1978, Libya was engaged in heavy fighting deep in Chad.

3. Mr. President, Professor Cahier said to you that Chad should not mention the invasion by Libya, as it would introduce a bad atmosphere into the Court (CR 93/18, p. 49). But the truth must be told and it has direct relevance to theses proceedings, because it offers the explanation for what Libya tries to show as acquiescence by Chad.

4. Libya has throughout thought it a useful tactic before the Court to present the legal fight as one between powerful, colonial France and an unprepared Libya. the reality is very different. The reality is a dispute between a powerful Libya, with all of its material resources, and a weak and desperately poor Chad. And the military occupation of the Aozou strip by Libya, and its past military action even beyond that,

illustrates the realities of the relationship between these two unequal contestants.

5. The broad policy of Chad over the years has been to deal with all problems, if at all possible, through negotiation and accommodation. This has been perceived as a necessary, as well as a prudent policy, because Chad has throughout these difficult years faced a problem on two fronts ? internal rebellion, amounting at times to civil war, and international aggression from Libya. And this international aggression has itself had two facets ? support for the rebels, in order to destabilize Chad, and military action in the BET, and the occupation of the Aozou strip. Chad has also had to deal with another problem of unimaginable minimization: extreme poverty.

6. So let us begin with the treaties to which Professor Cahier referred. Mr. President, Members of the Court, Chad has already shown in its Counter-Memorial and in these oral pleadings that far from supporting the Libyan thesis that no frontier existed the substantive terms of those treaties exactly presuppose and assume an existing frontier. I now speak rather of what we are to deduce from the very fact that these treaties were concluded between 1971 and 1992. Professor Cahier tells you that you should deduce that even if Chad had originally thought it had rights in the Aozou strip, it renounced them and rec ognized that Libya was "*chez soi*" in the Aozou strip (see CR 93/18, p. 59).

7. Mr. President, Members of the Court, I must suggest something different. For over 20 years Chad has lived in tea threatening shadow of its powerful neighbour. Chad does its best, day in and day out, in the most difficult of circumstances. Every day it must fact the reality of its extreme poverty. Every day it must choose whether to try to accommodate its neighbour in order to contain the external threat and the internal instability, or whether it should vigorously protest against illegal Libyan action and perhaps risk losing more of its territory to Libyan occupation. Libya claimed, we now belatedly know, vastly more than the area into which it has already moved. If it was "entitled" to move into the Aozou strip, why not all the way down to the 15th parallel?

8. A treaty was concluded between Chad and Libya in 1966. At this time Chad had no cause to

believe that Libya would restle firm its commitments under the 1955 Treaty with France. As for the Treaties of 1972, 1974, 1980 and 1981, the legal consequences to be drawn form them will be more easily understood if we locate them within the events of the time.

Chad's First Responses to Libya's Change of Policy

9. As explained in Chad's Memorial (p. 22, para. 77), the Central Government of Chad, then headed by François Tombalbaye, lost control of a substantial part of the BET. There had been a revolt by Aozou nomadic guards in March 1968, and in September the national army had to evacuate the outpost. Aozou fell first under the control of the FROLINAT armed movement, led by Abba Sidiq, and then of the Forces armées du Nord, led by Hissène Habré and Goukouni Oueddei.

10. Chad believed that Libya was probably assisting the rebel movements from 1969. By 1971 the evidence had become plain. Chad formally protested, referring the maqtter to the General Assembly in the autumn (United Nations, *Official Records of the General Assembly, Twenty-fifth Session*, 1955th meeting), and breaking off diplomatic relations. Professor Franck will be elaborating this. Not only did Chad object to Libyan interference in its internal difficulties, but it also used the General Assembly meeting to protest the publication by Libya of a map showing substantial parts of Chad territory as lying within Libya's borders. This was the celebrated occasion on which the Libyan representative told the General Assembly that the map was incorrect and that Libya had no designs on Chad territory. Did Libya regard itself simply as on its own territory. If we are to believe that, why was the map ? which showed the Aozou strip as Libyan ? disavowed?

11. Having made its protest, and having heard this reply, it became the policy of the weakened Chad Government to deal with its northern neighbour as best it could through negotiations. Accordingly, diplomatic relations were re-established in April 1972 and President Tombalbaye visited Tripoli later in the year. Obviously, this policy was not an acceptance by Chad of Libya's claims to the 1935 line and the Aozou strip. In any event, Libya had recently denied at the United Nations that it had any such claim. Chad

hoped, after the Tombalbaye visit, that the Treaty of Friendship, Co-operation and Mutual Assistance concluded on that occasion (MC, Vol. II, Ann. 16) would lead to an improvement. The hope for financial aid from Libya was also a factor to be taken into consideration. And the factual background and chronology that I have just described, Mr. President, makes it clear that no question of acquiescence by Chad arose.

12. The Treaty of 1972 spoke of co-operation between the peoples of Chad and Libya. The Parties were to develop co-operation between the peoples of Chad and Libya. The Parties were to develop co-operation in the economic, financial, commercial, technical, cultural, social, educational and scientific fields. And a joint committee was to be set up to this end.

13. A joint communiqué was issued after the conclusion of this Treaty (RC, Vol. III, Ann. 158). Mr. President, we can see from the witness statement of Mr. Lamana, the Minister of Economics of Chad in 1972, deposed with the Court in relation to the so-called Tombalbaye letter (Witness Statements deposed in the Registry of the Court, 9 February 1993), that joint commissions were indeed set up. He says that during the commission meetings neither the existence of nor the matters allegedly covered by the Tombalbaye letter discussed at all.

14. Although three technical committees were set up, little progress was made under them, because of the Libyan occupation that soon followed. And it is clear from the joint communiqué, to which I referred, that President Gaddafi's main objective in the Treaty was tto secure Chad's ending of diplomatic relations with Israel. Chad hoped that by accommodating Libya's demand it would secure two tangible benefits. We see from the official Chad press (RT, Vol. III, Ann. 160) that Mr. Lamana, the head of the Experts accompanying President Tombalbaye had

> "présentait pour sa part aux experts libyens, tous les projets économiques et sociaux du Tchad, susceptibles d'être financés par la République arabe libyenne".

The same contemporaneous document shows further that Chad was at that time seeking financial assistance also from Zaire.

15. The second benefit or the *quid pro quo* for the rupture of relations with Israel was to be the

cessation of Libyan support for the rebels in the BET. That objective is also referred to in the press of the time.

> "Au cours des entretiens au sommet tchado-libyen, la délégation libyenne a fait savoir à la délégation tchadienne que la Libye était prête à remettre au Tchad tous ceux qui se réclament du 'FROLINAT' et qui se trouveraient sur son territoire." (*Ibid.*, Anns. 159 and 160.)

Chad had some hope oif success, because in the joint communiqué President Gaddafi expressed appreciation for "la courageuse décision prise par le président François Tombalbaye" that is to break relations with Israel.

16. But infiltration continued and the Aozou strip came under Libyan military occupation in 1973. It was a time of the greatest difficulty for Chad. Relations with France needed mending. Tombalbaye had charged the then Secretary for African Affairs, Jacques Foccart, with encouraging secessionist tendencies in the north (*Africa Contemporary Record, 1974-75*, B567). Chad's preoccupation was above all with the internal rebellion and Libya's role in that. It was to that priority had to be given. ASnd as it was reported in *Africa Contemporary Record 1974-5*, "Relations were pursued during 1974 without very much enthusiasm". Explaining why relations were kept open at this time, and indeed technical agreements concluded, in March 1974 President Tombalbaye answered as follows "In view of our geographical position, we are condemned to develop relations with our neighbours to the east and north." *(Ibid.)* This is the background to the 1974 Treaty later in the year, to which President Gaddafi's visit to N'Djamena was the prelude. Further, Chad secured in this Treaty a reference to the fact that the colonial origins of their common frontier should not in future obstruct good relations. Neither the background nor the terms of the Treaty can conceivably be read as acquiescence. On the contrary.

17. The 1974 Treaty spoke of co-operation between the peoples of Chad and Libya, in spite of the colonial frontier "between the two peoples" (Art. 2). Chad began to think that a zone of co-operation ? *not* a buffer zone ? *a zone of co-operation* ? might now be the best way to deal with the problem of Libyan occupation. A joint Libyan-Chad Committee was to be formed to deal with the movements of inhabitants in the region (Art. 4). Mr. Lamana, in the deposition I referred to a few moments ago, states that President Tombalbaye had told him, *after* his visit to Tripoli in November 1974, that the idea was to create

> "une zone de solidarité et de développement comprenant une frange de territoire au Tchad incluant la bande d'Aozou et la même frange en territoire libyen. Les raisons de cette

proposition, soutenait le président Tombalbaye, étaient que:- en acceptant la création de cette zone dans la forme suggérée les Libyens reconnaitraient implicitement que la zone contestée de la bande d'Aozou appartiendrait au Tchad." (Witness statements deposited in the Registry of the Court, 9 February 1998.)

18. Problems continue to beset Chad during this period. German and French archaeologists had been given permission to visit Bardai at a time when the village seemed quiet and a truce was in effect. They were attacked by armed rebels under Hissène Habré. The wife of the German scientist was killed, and Dr. Staewen and his French colleague Françoise Claustre, were taken hostage. During the next two months the Chad Government was absorbed with this human problem too, preparing possible military actions,dealing with the demands of Hissène Habré on the matter, and coping with the consequential strains on bilateral relations with Germany and with France. Indeed, diplomatic relations were ruptured with the former.

19. At the same time Libya's occupation could not and did not go unchallenged. In August 1974 M. Bruno Bohiadi, the Minister for Foreign Affairs of Chad, and M. Mahamat Yakouma, the Secretary of State for the Interior, went to Tripoli. They raised the issue of the occupation of Tibesti by Libya. Libya's response was that they had onbly police at Aozou to ensure the security of the population of both countries. The representatives of Chad insisted that they knew it was a military detachment at Aozou and, in any event, "La Libye ne saurait assurer unilatéralement de4s opérations de maintien de l 'ordre dans cette partie du territoire tchadien." (S/15649 21 March 1983, letter addressed to President of the Security Council from Chad, reviewing events from 1974-83.)

20. Libya, in these oral pleadings, has tried to show that in 1974 Chad was content for Libya to occupy the Aozou strip, made no protest, and indeed pursued friendly relations with Libya at the time. The reality is very different. Protests *were* made, in Tripoli and at the United Nations.

21. In July and August 1974 the French Government had unilaterally decided to intervene with the rebels. But, once more, one of their number was then detained by the rebels at Zoui on 4 August. And this was then followed by demands for the delivery of arms. The situation rapidly deteriorated further. After

warning on 2 April 1975 that the detained Commander Galopin would be executed if arms were not delivered. Habré then ordered the carrying out of this murder on 4 April 1975.

22. Scarcely a week had passed before President Tombalbaye was also assassinated (Buijtenhuijs, R., *Le Frolinat et les Guerres Civiles du Tchad*, 1977-84, Paris, eds. Karitela, 1987, p. 102). His powers were assumed by General Malloum, whose turn it now was to become preoccupied with the civil war in the Aozou strip. I should make clear to the Court that this was not a secessionist war. Each faction wanted power. No faction wanted to come under Libyan rule. The making of formal international protests at the occupation of Libya at this moment assumed a lesser priority.

23. Further, Chad-French relations were now very much to the forefront ? regarding the events as having been precipitated by the French unilateral contact with the regels, General Malloum ordered the closing of the French military base at N'Djamena. This large operation took place in October 1975 (Buijtenhuijs, p. 297). Not until March 1976 had relations between the two countries improved sufficiently for new accords to be signed. In the intervening time Chad had had to bear the economic consequences, directly and in terms of aid, of the expulsion.

24. Meanwhile the domestic situation continued to be critical. Grenades were thrown at a military parade in N'Djamena in April 1976. Chad made what military efforts it could in the Aozou strip to dislodge Libya. As it was reported by the impartial *African Contemporary Record* at the time (1976-77, B76):

> "the border with Chad promises to become a major source of difficulty. Relying on a 1935 agreement between the colonial powers, France and Italy, Gaddafi claims a wide area along Chad's northern border, stretching through Tibesti, Borkou and Ennedi ... The Chad Government is not in control of this area and the Frolinat rebel groups which operate there cannot force the estimated 4,000 Libyan soldiers out, although they killed 10 and captured 17 in a clash in 1976."

This is part of the pattern of events within which the treaties are located.

25. Faced with this reality, and doubly concerned with the Libyan occupation and the support being given to the rebels, Chad's policy varied between denunciation, doomes military effort against superior forces, and attempts at negotiation. It was the politics of desperation, not of acquiescence. In mid-1976 a

Chad Mission led by Colonel Ngadinar, Vice-President of the Supreme Military Council, went to Tripoli. It reported that, upon Libya showing them a 1956 Oxford Atlas with the 1935 Laval-Mussolini line

> "la délégation tchadienne s'étonne alors de la remise en cause de cette frontière après vingt ans d'indépendance du Tchad, et ce, en violation flagrante de la déclaration du Sommet de l'OUA du Caire de juillet 1964 . . ." (MC, Vol. IV, Ann. 283).

Further mixed commissions were proposed. But later in the year Chad closed its border with Libya (*Africa Contemporary Record 1976-7*, B75). It also vigorously denied to the General Assembly that autumn rumours of cession of the territory. In early 1977 negotiation seemed the preferredpolicy. But on 20 June 1977 Frolinat launched an offensive against the post at Ounianga Kebir, and then on 22 June the garrison at Bardai was encircled. On 23 June the Technical Mixed Commission met in N'Djamena. The procès-verbal shows that the Chad delegation raised

> "l'occupation illégale d'Aozou par la Jamahiriya arabe libyenne . . . Cette présence libyenne en territoire tchadien empêche toute co-operation quels que soient sa nature et son objet." (MC, Vol. IV, ann. 284.)

On 4 July, following two weeks of siege, the post at Bardai had to surrender. Zouar, which had also suffered an attack, had to be evacuated. The Tchad army had lost 300 men, the rebels had gained the Tibesti (Buijtenhuijs, p. 281).

26. The Chad Government furiously denounced Libya, both for its occupation of the Aozou strip and for its support of the rebels. The Government also issued various decrees aimed at controlling the movements and financial resources of Libyans living in Chad (*African Contemporary Record 1976-7*, B78). Whatever the internal problems, whatever the preoccupations with the war against the rebels, or relations with France, or the need for aid, it was time to bring the issue back to the United Nations and to the Organization of African Unity.

27. And this Chad did at the 22nd session of the General Assembly, where strong complaints were made against Libya's actions in and claims to the Aozou strip. At the same time, the matter was referred to the OAU, on the basis of equally strong complaints about Libya's claims and actions. All of this has been recounted in Chad's Memorial (pp. 26-29), and Counter-Memorial (pp. 300-301) and will be taken up by

Professor Franck.

28. By the following year Chad had decided to follow up on its protests in the Security Council. The protest of Chad at Libyan aggression, and the legal position on which it was based, has been recounted in MC, pages 302 to 306, as is the Libyan response. The Security Council postponed consideration of the matter because, as a result of mediation efforts launched by the President of Gabon and the President of Sudan, there appeared to Chad at that moment to be the possibility of an African solution. Chad was not to know that Libya would not, for ten further years, co-operate with the OAU efforts to resolve the dispute. But the detailed statement by the Chad representative in the Security Council on 17 February 1978 makes it absolutely clear that Chad maintained its legal position over the Aozou strip, insisting that Chad's sovereignty was opposable to Libya and that Libya was appropriating Chad territory by force (United Nations, *Official Records of the General Assembly*, 2060th meeting; and MC, p. 303).

29. Furthermore, both government and those in rebellion were agreed that Libyan aggression must end. In October 1978 there was an agreement between these parties, acting through a provisional Government of National Unity, to establish "a plan of work for the liberation of occupied Chad territory" (S/12888 9 Oct. 1978, Ann. P199). So, Mr. President, even those most dependent on Libya's financial support did not believe that the Aozou was Libya's.

30. In the period 1979-1981 Chad did not persist with its objections on the Aozou. The civil war was raging. Again, this preoccupied the Chad authorities: and indeed a large Libyan so-called "peace force" was said by the representative of Chad in 1981 to be in that country "at our request" (United Nations, *Official Records of the General Assembly, Thirty-sixth Session, Plenary Meetings*, 30th meeting, 7 October 1981, paras. 120-121; MC, p. 307). During this brief period of apparent *rapprochement* a merger was even broached between Chad and Libya. This was strongly objected to by several African countries before the Security Council, and unanimously by the 12 Heads of SDtate of the OAU, who saw Libyan expansion being consolidated in the face of an overly compliant Chad regime. The proposals for merger came to nothing.

31. It was during this period that the Libyan-Chad Treaty of June 1980 was concluded. Its terms refer to mutual defence against external aggression and to the fight against colonialism in all its forms in Africa: striking and, you mak think, ironic provisions. Professor Cahier asked whether such a treaty did not evidence acquiescence (CR, 18 June, p 48). No, it does not evidence acquiescence. Mr. President, Members of the Court, Chad was under military occupation when that Agreement was concluded. And the same was true of the Treaty of 1981.

32. There is something particularly distasteful about a powerful State which militarily occupies a portion of a neighbour's territory, instills fear that it will occupy yet more, and then says that the inability of its powerless neighbour to protest effectively amounts to acquiescence.

33. The cry of protest was taken up again, after the withdrawal of Libyan troops later in 1981, in the Security Council and in the OAU. Immediately upon a change of government in N'Djamena, in 1982, Chad renewed its protests against Libyan territorial claims at the General Assembly in October 1982 (MC, p. 303). But in 1983 Libya returned pushing its military activities further into Chad. And Chad, in complaining to the Security Council about this aggression, took the occasion also to reiterate its position on the Aozou strip. Hissène Habré, now President, urged the Security Council to call upon Libya to put an end to the illegal occupation of the northern part of Chad (S/15644, 17 March 1983, Annex, p. 205). And as we've shown in our Memorial, there was wide African support for Chad's legal case (MC, p. 311).

34. The reality is that although Chad continues to try to maintain good relations with its neighbours, it has learned, even in the face of ongoing problems, regularly to insist upon its sovereignty over all of Chad, including the entirety of the North and the Aozou strip.

35. Mr. President, Members of the Court what are the conclusions to be drawn? The first is that there was no acquiescence by Chad. Professor Cahier has asked you to draw conclusions from a certain sequence of events he put before you. We ask you to draw different conclusions from a less selective sequence of events.

36. To secure title, certain *effectivités* are required. The exercise of the appurtenances of sovereignty needed to secure title may be subject to interruptions and intervals: the *Island of Palmas* case

M. PELLET : Merci beaucoup, Monsieur le Président. Monsieur le Président, Messieurs les juges,

1. Il nous a semblé que l'on ne pouvait laisser sans réponse les allusions, toujours embarrassées mais de plus en plus fréquentes à mesure que la procédure avançait, qu'a faites la Partie libyenne, à une lettre qu'aurait écrite le président Tombalbaye au colonel Kadhafi, le 28 novembre 1972.

Cette "lettre Tombalbaye" et je mettrai cette expression entre guillemets jusqu'à la fin de cet exposé, est entourée d'un halo de mystères (au pluriel) dont l'attitude adoptée par la Libye au cours de la présente procédure n'est pas le moindre.

2. Le mémoire libyen ne souffle mot de ce document qu'il n'annexe pas alors que la Libye n'avait pas hésité à le produire, en 1987, devant le sous-comité juridique de l'OUA. C'est d'ailleurs la copie fournie alors par ses représentant que le Tchad a reproduite en annexe 343 à son propre mémoire et non pas une autre copie qui, bien entendu, n'existe pas, contrairement à ce que certaines formules utilisées dans les écritures libyennes sous-entendent (voir not., réplique, p. 272, par. 11.19), cela était pourtant clairement précisé à la page 35 du mémoire tchadien.

J'ajoute que le Tchad n'a pas "choisi" (voir réplique de la Libye, p. 272, par. 11.15) d'annexer ce document à son mémoire. Il l'a produit, tout simplement parce qu'il lui paraît être du devoir des Parties de soumettre à la Cour tous les documents relatifs à l'affaire dont elles l'ont saisie et l'on peut s'étonner que la Libye ait une conception différente ? et ceci alors même que les scrupules dont elle fait état ne l'avaient pas empêchée de brandir la "lettre Tombalbaye" devant les instances de l'OUA et ne l'ont pas empêchée non plus d'invoquer, à maintes reprises, cette lettre mystérieuse dans la présente procédure et avec d'autant plus d'insistance que la Libye semblait de moins en moins confiante dans la force de sa thèse, comme si elle voyait dans ce document une sorte de "jocker" honteux. Car si c'est le Tchad qui l'a produit, à titre documentaire, c'est bien la Partie libyenne qui tente d'en tirer argument.

3. Je relève cependant, Monsieur le Président, que si, en plaidoirie, les conseils de la Libye ont longuement parlé de la "lettre Tombalbaye" (voir 93 93/14, p. 44-64 et CR 93/18, p. 34-40) ils se sont principalement attachés à discréditer les témoignages que le Tchad a fait parvenir à la Cour le 9 février dernier avec l'accord de la Partie libyenne. Nous remercions la Libye de cet accord, même si elle semble aujourd'hui regretter d'avoir donné son consentement s'il faut en croire ce qu'a dit M. Maghur à ce propos le 14 juin (CR 93/14, p. 46-47).

Ceci est pour moi l'occasion d'ailleurs de faire une mise au point : nous ne prétendons nullement que ces témoignages, recueillis sous serment par un conseiller à la Cour d'appel de N'Djamena, établissent, de façon décisive, l'appartenance de la bande d'Aouzou au Tchad. Simplement, face à un document exhumé par la Libye, dans des circonstances obscures dont elle ne disait rien ? elle n'en dit d'ailleurs toujours rien ?, il a semblé utile de demander aux personnes encore vivantes et se trouvant au Tchad, qui auraient dû ou qui auraient pu entendre parler de cette "lettre" du fait des fonctions qu'elles exerçaient à l'époque, si elles en avaient eu connaissance et, à défaut si, compte tenu de ce qu'elles connaissaient du contexte, l'envoi d'un tel document leur paraissait "vraisemblable". Messieurs de la Cour, vous connaissez leur réponse.

4. Je vois deux explications, complémentaires à l'étrange attitude adoptée par la Libye sur la "lettre Tombalbaye" durant la procédure devant la Cour :

? la première concerne le fond même de ce document qui contredit sa thèse au moins en ce qu'il circonscrit clairement le débat et montre que c'est bien la "bande d'Aouzou" (expression alors anachronique) qui était et qui demeure l'objet du différend;

? la seconde tient certainement aux doutes que l'on peut nourrir quant à son authenticité.

5. De nombreux éléments, troublants et concordants, contribuent en effet à entretenir les doutes les plus sérieux sur l'authenticité de cette "lettre" que la Partie libyenne a produite devant les instances de l'OUA et dont, je le rappelle, le Tchad s'est borné à annexer la copie à son mémoire : pourquoi une lettre secrète quand un traité semblait s'imposer ? Pourquoi ce secret alors que le jour même où la lettre a été envoyée et dans les semaines qui ont suivi, de multiples occasions d'en faire état se sont présentées, comme plus tard, à l'ONU ou à l'OUA et lors de nombreuses rencontres

multilatérales et bilatérales ? Pourquoi ce document, essentiel selon la Libye, est-il demeuré sans réponse ? Pourquoi ces expressions étranges ("en ma qualité de Président *légal* du Tchad") ou datées à l'époque ("bande d'Aouzou") ? Pourquoi cette frappe défectueuse, cette présentation inhabituelle, un numéro d'ordre erroné ? nous avons retrouvé des lettres antérieures du cabinet présidentiel portant des numéros plus élevés ? Pourquoi cette signature douteuse ? Comment un document de cette importance aux yeux de la Partie libyenne a-t-il pu s'égarer ? Pourquoi, contrairement aux usages les mieux établis, son destinataire, le colonel Kadhafi, n'en a-t-il pas accusé réception ? La réponse se serait-elle égarée aussi ? Et pourquoi la Libye, qui s'est abstenue de l'annexer à ses écritures, l'a-t-elle néanmoins produite devant l'OUA ?

Cela, Monsieur le Président, fait beaucoup de questions ? trop assurément ? pour que ce document puisse servir d'élément de preuve devant la plus haute juridiction mondiale.

6. Du reste, Monsieur le Président, la raison invoquée par la Libye pour justifier la prudence initiale dont elle a fait preuve en ne produisant pas ce document est, elle aussi, assez surprenante... Elle invoque l'inexistence de l'original et s'en explique ainsi : "newly emergent African States have commonly experienced the difficulty of records being lost and destroyed" (contre-mémoire, p. 302, par. 5.120). Mais, Monsieur le Président, si le Tchad a été longtemps déchiré par des guerres civiles qui ont entraîné, en effet, la dispersion et la perte de ses archives, le régime libyen, lui, est remarquablement stable depuis 1969, et l'on peut tout de même s'étonner, même si tout est possible, qu'un document auquel la Libye attache une telle importance ait pu s'égarer; ceci est tout de même moins courant que ne l'a dit le conseil libyen... (CR 93/14, p. 47) ! Au surplus, se le rappelle, cette circonstance n'avait pas empêché la Libye de l'utiliser devant les instances de l'OUA.

L'OUA avait d'ailleurs réagi avec prudence, et dans son rapport des 13-14 avril 1988, le comité ministériel *ad hoc* de l'OUA, "a décidé de ne pas prendre en considération ledit document quant à l'examen de sa validité juridique en l'absence de la présentation par la Libye de l'original de ce document et de la vérification de son authenticité" (mémoire du Tchad, annexe 292, p. 5). Ce n'est que par la suite que la Libye semble s'être aperçue qu'elle ne retrouvait pas l'original.

Soit dit en passant, la Libye, qui a constaté la mauvaise qualité de la copie dont nous

dispositions (voir CR 93/14, p. 45), ne s'est pas offerte à en fournir une meilleure, alors que, il faut le répéter, c'est ce pays qui avait remis ce document à l'OUA. Puisqu'il s'agit d'une photocopie, il faut bien qu'elle ait été copiée de quelque chose; à force de photocopier des photocopies, il n'est guère étonnant que le texte devienne de moins en moins lisible. Le Tchad ne pouvait reproduire que ce dont il disposait; mais la Libye, elle, est à l'origine de la chaîne.

7. Quoi qu'il en soit, Monsieur le Président, la Cour voudra certainement elle aussi, comme les instances de l'OUA, faire abstraction d'un document aussi incertain. Certes, le Tchad n'ignore pas que les règles relatives à la présentation des preuves sont moins strictes et moins formalistes dans un procès international qu'elles ne le sont en général dans les droits nationaux où, d'ailleurs, elles varient considérablement d'un pays à l'autre. Il n'en reste pas moins qu'une Partie ne saurait se fonder sur un document dont l'authenticité ne peut être établie et est, comme je l'ai montré, fortement sujette à caution en l'espèce.

Au surplus, comme l'indique Sandifer, en s'appuyant sur la jurisprudence existante, les originaux des éléments de preuve doivent être produits s'il n'existe pas de justification plausible de leur destruction (*Evidence before International Tribunals*, U.P. of Virginia, 1975, p. 205-218); or la Libye présente la disparition de la lettre Tombalbaye" comme un fait sans en donner la moindre explication vraisemblable.

Il existe d'ailleurs des précédents en ce sens devant la Cour elle-même, et par exemple dans les affaires du *Détroit de Corfou* et *Ambatielos*, la Cour a demandé aux Parties de présenter les originaux de certains documents dont l'authenticité avait été contestée (voir *C.I.J. Mémoires*, 1947, vol. III, p. 175 et 544-545, et 1951, p. 547; voir aussi l'affaire de la *Sentence arbitrale du roi d'Espagne* (*ibid.*, 1958, vol. II, p. 164).

Du reste, quand bien même un original aurait été produit, une expertise se serait évidemment imposée tant sont grands les doutes pesant sur l'authenticité de ce document. Mais nous n'en sommes pas là puisque, précisément, l'original semble s'être évaporé.

8. En tout état de cause, en admettant même qu'elle existe vraiment, ce que je ne concède que pour les seuls besoins de la démonstration ? le moins que l'on puisse dire est que nous n'en savons

rien ? la "lettre Tombalbaye" n'aurait évidemment aucune valeur probante.

La Libye reconnaît que ce document mystérieux n'est pas un traité. Elle y voit un acte unilatéral (voir contre-mémoire, p. 303, par. 5.123; réplique de la Libye, p. 271-272, par. 11.17, et CR 93/14, p. 48 ou CR 93/18, p. 35-36), un de ces actes dont la Cour a reconnu dans l'affaire des *Essais nucléaires*, qu'ils "peuvent avoir pour effet de créer des obligations juridiques" (*C.I.J. Recueil 1974*, p. 270).

Assurément, tel *peut être* le cas. Encore faut-il que certaines conditions soient remplies et, parmi ces conditions, il en est une qui présente une importance particulière : il faut que la déclaration invoquée ait été faite publiquement. La Cour y a insisté dans ses arrêts du 20 décembre 1974 à propos des divers engagements du Gouvernement français auxquels elle s'intéressait :

> ? "Un engagement de cette nature, *exprimé publiquement*, et dans l'intention de se lier ... a un effet obligatoire." (*Ibid.*, p. 267, par. 43.)
>
> ? "Les déclarations unilatérales des autorités françaises *ont été faites publiquement*..." (*Ibid.*, p. 269, par. 50.)
>
> ? "La Cour constate en outre que le Gouvernement français a assumé une obligation dont il convient de comprendre l'objet précis et les limites dans les termes mêmes où *ils sont exprimés publiquement*..." (*Ibid.*, p. 270, par. 270.)

De même, dans l'affaire du *Groenland oriental*, que mentionne également la Libye (réplique, p. 271-272, par. 1.17), la Cour permanente a attaché une grande importance à certains éléments qui témoignaient de la publicité donnée à la fameuse déclaration Ihlen, qu'il s'agisse des négociations diplomatiques globales dans le cadre desquelles elle fut faite (voir *C.P.J.I. série A/B n° 53*, p. 37 et 55-60) ou de la réitération ultérieure de l'engagement (*ibid.*, p. 73).

Monsieur le Président, si cette lettre a jamais été écrite, la "lettre Tombalbaye" a été gardée secrète, tant pas son auteur que par son destinataire, et ceci pendant quinze ans. Ce seul fait interdirait, en vertu de la jurisprudence même qu'invoque la Libye, de lui faire produire quelque effet de droit que ce soit et cette considération s'impose avec une force particulière s'agissant de 114 000 kilomètres carrés de territoire tchadien, enjeu d'un débat diplomatique ancien et tout à fait public.

9. Le problème, d'ailleurs, est de plus vaste portée. Nous sommes à la fin du XX^{e} siècle. A la suite du discours du président Wilson du 8 janvier 1908, le Pacte de la Société des Nations et la

Charte des "Nations Unies ont proscrit sinon la diplomatie secrète, du moins le "droit confidentiel", si j'ose dire, contribuant ainsi à la moralisation ? toute relative ! ? des relations internationales.

Il serait inconcevable que le sort d'immenses territoires puisse se jouer, comme c'était malheureusement le cas jadis, dans le secret de correspondances, au surplus, fort hypothétiques dans notre affaire.

Monsieur le Président, imagine-t-on M. Mitterrand reconnaître, "en sa qualité de président légal de la République française", dans une carte de vœux adressée à la reine d'Angleterre, que le duché de Normandie, voire le duché d'Aquitaine, "ont été et seront, sans aucun doute, partie intégrante du Royaume-Uni" ? Peut-on imaginer sans rire le Gouvernement britannique s'en prévalant vingt ans plus tard devant votre haute juridiction ? Ce ne serait pourtant ni plus ni moins incongru que ce qu'entend établir la Libye en exhumant cette mystérieuse missive dont, la main sur le cœur, ses représentants viennent affirmer dans cette enceinte, qu'ils ont la conviction qu'elle est authentique (CR 93/14, p. 24 et 46) ou "vraisemblable" (CR 93/18, p. 37) ou, au moins, "loin d'être invraisemblable" (CR 93/18, p. 36)...

D'ailleurs, allons plus loin, peut-on sérieusement envisager qu'il viendrait à l'idée d'un chef d'Etat responsable d'écrire une telle lettre ? La réponse est bien sûr négative. Mais alors, pourquoi prêter un tel dessein à Tombalbaye ? Parce qu'il était le chef d'un Etat africain, pauvre et démuni ? Parce qu'il est mort ? Je ne peux pas penser que les autorités d'un Etat voisin puissent croire à une telle fable, et s'ils y croyaient, vous ne pourriez y croire, Messieurs de la Cour !

10. La République du Tchad considère que la Partie libyenne ne rend pas service à la Cour en lui demandant de prendre en considération un tel document. Si votre juridiction décidait qu'un litige de l'importance de celui qui vous est soumis pouvait être, je ne dis pas tranché, mais simplement influencé, par la copie suspecte d'une lettre secrète rangée dans un tiroir pendant quinze ans, ce serait ouvrir la voie à toutes les manœuvres, à toutes les manipulations.

La République du Tchad vous demande respectueusement, Monsieur le Président, Messieurs de la Cour, de n'en tenir aucun compte.

Monsieur le Président, si vous le voulez bien, le professeur Franck présentera maintenant à la

Cour les débats qui se sont déroulés à l'OUA et aux Nations Unies et qui confirment la reconnaissance généralisée tant par les Etats africains que par la communauté internationale dans son ensemble de la souveraineté tchadienne sur la région que revendique la Libye. Si vous souhaitez faire une pause ce serait peut-être le bon moment.

Je vous remercie vivement, Monsieur le Président.

The PRESIDENT: Thank you very much, Professor Pellet. Yes, it's a good place to take our short break. Thank You.

L'audience est suspendue de 11 h 10 à 11 h 20.

M. PELLET : Monsieur le Président, Messieurs de la Cour,

1. Il m'incombe de "fermer la marche".

Puisqu'il nous reste un peu de temps ? je m'empresse de vous rassurer : je ne l'utiliserai pas entièrement ! ? Il nous a semblé qu'il serait peut-être utile, après tant d'heures de plaidoirie de résumer les points essentiels de nos arguments. Certaines digressions, rendues nécessaires par notre souci de répondre à tous les points soulevés par la Libye, aussi artificiels qu'ils soient, les ont peut-être fait perdre de vue.

2. Monsieur le Président, les plaidoiries orales ont mis en évidence un phénomène que pouvaient laisser présager les écritures des Parties mais peut-être pas avec la même clarté : elles vous présentent des thèses, certes différentes ? sinon nous ne serions pas ici ? mais plutôt parallèles qu'opposées; comme des droites parallèles, leurs discours ne se rencontrent jamais aussi loin qu'on les prolonge.

Deux traits, devenus maintenant évidents, caractérisent l'argumentation libyenne :

1) L'argumentation de la Libye "s'arrête en route" si j'ose dire. Dans son contre-mémoire, elle avait affirmé qu'il convenait de distinguer deux éléments : "i) title to the territory, and ii) the evidence of a precise boundary" (p. 369-370, par. 8.17). Mais, en fait, la Partie libyenne fait porter tous ses efforts sur la première de ces propositions et témoigne d'une superbe indifférence à l'égard de la seconde à laquelle, tout à fait en fin de plaidoirie elle a fait mine de s'intéresser, "to pay lip service" comme l'on dirait en anglais.

2) Mais, même en ce qui concerne la question du titre territorial, la Libye ne pousse pas son raisonnement jusqu'à son terme. Par commodité, je me référerais à la dernière plaidoirie du professeur Bowett, mais l'ensemble des interventions des conseils de la Libye sont très frappantes à cet égard : la Partie libyenne expose longuement les *revendications* ottomanes puis italiennes. Le mot "revendication" apparaît trente-huit fois dans ce que nous a dit M. Bowett le 22 juin pour résumer l'argumentation libyenne; et l'on peut y ajouter l'expression "position de négociation" dont mon éminent ami et contradicteur d'occasion a usé à plusieurs reprises. Mais l'addition de trente-huit revendications n'a jamais abouti à la création d'un titre territorial ou à la définition d'une frontière.

Si le titre résulte de l'exercice effectif des fonctions étatiques, seul ce même exercice des mêmes fonctions par un autre Etat peut le détruire. Si le tracé de la frontière (ou le titre territorial) résulte d'un accord entre deux Etats, seul un autre accord, conclu entre ces mêmes Parties, peut le modifier.

3. La Libye critique âprement le tracé frontalier dont le Tchad croit avoir établi l'existence et la permanence mais elle se montre étonnamment discrète sur celui qui fait pourtant l'objet de ses conclusions et qui suit le 15e parallèle nord.

En lisant ses écritures et en écoutant ses conseils, vous avez certainement, Messieurs de la Cour, eu l'impression, qui avait été celle de la Chambre de votre Cour dans l'affaire *El Salvador/Honduras*, que, pour la Partie libyenne,

> "l'emplacement des limites n'avait qu'un caractère accessoire par rapport à telle ou telle 'attribution de terres... C'est un peu comme si les frontières en litige devaient être reconstituées à la manière d'un puzzle à partir de certaines pièces prédécoupées, de sorte que l'étendue et l'emplacement de la frontière obtenue dépendent de la taille et de la forme des pièces à insérer." (*C.I.J. Recueil 1992*, p. 388, par. 44.)

Ici, pour trois ans, quelques soldats turcs : la Libye proclame son titre territorial et déclare que la frontière passe au sud; voici un petit morceau de puzzle. Là, les Senoussistes avaient établi une *zaouia* pendant quelques années; le traitement sera le même. Ailleurs, on n'a pas trace d'une présence française entre telle et telle date : la Libye s'annexe la pièce... Le puzzle auquel la Libye aboutit est d'ailleurs assez surprenant. Prenons, par exemple, la carte n° 20 figurant dans le grand livre vert remis en plaidoirie par la Partie libyenne, qui prétend figurer l'implantation senoussiste en 1902; comparons cette carte n° 20 avec la carte n° 105 du mémoire libyen qui traduit les prétentions de la Libye; on constate, par exemple, qu'Abéché et Bir-Alali qui sont au Tchad, mais aussi Bilma et Zinder qui sont au Niger ou Kano qui est au Nigéria figurent sur la première, la carte n° 20, mais pas sur la seconde. Le phénomène inverse se produit également, il n'y a pas de coïncidence entre tous ces éléments.

Certes, comme l'ont remarqué les deux Chambres qui ont eu à trancher des *Différends frontaliers*, si le

> "titre juridique n'est pas de nature à faire apparaître de façon précise l'étendue territoriale sur laquelle il porte[, l]es 'effectivités' peuvent alors jouer un rôle essentiel pour indiquer comment le titre est interprété dans la pratique" (*C.I.J. Recueil 1992*, p. 398, par. 61).

4. C'est dans cette perspective que s'est placé le Tchad en présentant sa "troisième thèse". Mais il ne l'a fait qu'à titre subsidiaire pour ne pas se dérober au débat sur le titre territorial auquel l'invitait la Libye.

L'emprise effective de l'administration civile et militaire de la France puis du Tchad lui-même ne fait aucun doute : l'une puis l'autre ont exercé, dans toute la région revendiquée par la Libye, de façon continue, paisible et exclusive des fonctions étatiques.

De façon continue car, à partir de 1913, la France est seule présente. Certes, ses soldats ne quadrillent pas chaque mètre carré de cet immense territoire désertique mais si un incident se produit, si un *rezzou* se dessine, ils y mettent bon ordre. La rareté même des troupes françaises constitue d'ailleurs la preuve du caractère paisible de l'administration coloniale : il n'est nul besoin de démonstrations de force impressionnantes puisque l'autorité de la France n'est pa contestée. Et si quelques "bavures" se produisent, si quelques soldats italiens ou quelques agents recenseurs libyens s'aventurent dans la région, ils sont, au nom de l'exclusivité de la compétence territoriale, poliment mais fermement, reconduits à la frontière ? sans qu'on leur offre à déjeuner, il est vrai !

J'ai bien dit "à la frontière", car si quelques incidents peuvent être recensés ? on les compte sur les doigts d'une main dans la période de soixante ans qui nous intéresse et qui va de 1913 à 1973 ?, ces incidents ne prouvent qu'une chose : la conscience aiguë qu'avaient les protagonistes non seulement de l'existence, mais aussi de l'emplacement de la frontière.

5. C'est que, s'il est commode, pour la clarté de l'exposé de distinguer trois lignes d'argumentation qui, prises isolément peuvent se suffire à elles-mêmes, elles se renforcent et s'interpénètrent pour conduire à une conclusion unique : une frontière existe et c'est celle dont les conclusions du Tchad décrivent le tracé.

Cette conviction ne se traduit pas seulement par les manifestations effectives sur le terrain, de la souveraineté de la France puis du Tchad ? jusqu'à ce que la Libye l'en déloge par la force au mépris du principe cardinal posé à l'article 2, paragraphe 4, de la Charte des Nations Unies. Cette conviction peut être déduite aussi de l'attitude publique tant des protagonistes que des Etats tiers.

Les revendications de l'Empire ottoman et de l'Italie auxquelles la Libye attache une telle importance constituent, la plupart du temps, la contestation de la situation qui existe et, par là même, *a contrario*, l'aveu de l'existence du titre ou de la frontière critiqués.

De même, le souci des Nations Unies de préserver l'intégrité territoriale de la Libye au moment où ce pays a accédé à l'indépendance, l'acceptation par l'Assemblée générale des explications données alors par la France, le silence conservé tant par l'Italie que par les représentants du peuple libyen *qui étaient présents*, témoignent, eux aussi, d'une conviction bien établie.

De même aussi, nous avons pu constater que lors du processus d'accession du Tchad à l'indépendance, nul, pas même la Libye, n'a fait allusion à un possible problème de frontière et le nouvel Etat a été admis aux Nations Unies après que le peuple tchadien eut exercé son droit à disposer de lui-même dans le cadre des frontières existantes conformément au principe de l'*uti possidetis*.

De même encore, plus tard, l'indignation suscitée à l'OUA et aux Nations Unies par l'invasion de la bande d'Aozou par la Libye et l'attitude embarrassée de celle-ci, pour dire le moins, renforcent la position juridique défendue alors par le Tchad, celle même qu'il continue à défendre devant vous. Le professeur Franck vient de le montrer.

6. Au demeurant, Monsieur le Président, comme la Libye l'a admis dans ses écritures, puis, à nouveau, en plaidoirie, "it is clear that if the Court does find the existence of ... a conventional boundary, the Court will have resolved the dispute..." (Réplique, p. 34, par. 3.66; voir aussi p. 30, par. 3.55 ou contre-mémoire, p. 28, par. 2.04; p. 31, par. 2.10 et 2.12 ou p. 36, par. 2.24.) C'est la Libye qui écrit cela. Les Parties, au moins, sont d'accord sur ce point : si un ou plusieurs traités apportent la preuve du tracé de la frontière, le débat sur celui-ci est clos et, du même coup la question, au demeurant fort claire, du titre territorial, l'est aussi : au nord de ce tracé, il relève de la Libye, au sud, il relève du Tchad.

Monsieur le Président, le litige qui est soumis à la Cour, est tout à fait paradoxal; il s'agit probablement d'un des différends frontaliers les plus "durs" de toute l'Afrique, l'un de ceux qui a coûté le plus de vies humaines : et pourtant la frontière contestée par la Libye est, très certainement,

l'une des mieux établies qui soient. Elle ne résulte pas seulement, en effet, de l'exercice effectif sur le terrain, de compétences souveraines par la France, puis par le Tchad. Elle découle aussi de traités, nombreux et concordants qui constituent autant de ce que l'on pourrait appeler des "titres frontaliers" dans la double acceptation de l'expression, à la fois en tant que fondements des droits des deux Etats d'exercer leur souveraineté territoriale de part et d'autre de cette ligne et comme sources et preuves documentaires de ce tracé.

La première et la deuxième thèses du Tchad reposent sur l'existence de tels traités.

7. La région de l'Afrique qui est en cause est inhospitalière et éloignée des côtes. Elle échappa longtemps au partage colonial qui ne l'affecta qu'à partir de 1898.

Dès l'année suivante, la limite de la sphère d'influence française était fixée par l'article 3 de la déclaration franco-britannique du 21 mars 1899. C'est cette limite qui a constitué par la suite la frontière entre le Tchad et la Libye, après que la France eut occupé effectivement la zone qui lui était réservée. Ce fut le cas dès 1913.

Tel est l'essentiel de ce que nous avons appelé notre "deuxième thèse".

Certes le Tchad n'ignore pas que le tracé de la limite, fixé "en principe" par l'accord de 1899, est ambigu si l'on s'en tient au texte de cet instrument. Mais l'étude des travaux préparatoires établit sans aucun doute possible que la ligne descendant "dans la direction du sud-est" depuis le tropique du Cancer n'était pas une ligne mathématique et la pratique ultérieurement suivie dans l'application du traité le confirme :

? alors même qu'elle n'a pas été formellement annexée à l'accord, la carte du *Livre jaune* établie par les Français dans les jours qui ont suivi sa signature, a été connue aussitôt de la partie britannique qui n'a pas élevé la moindre protestation, alors même que le *Livre jaune* est une publication officielle, solennelle, largement diffusée et que la grande presse s'en était fait l'écho et avait repris la carte;

? le tracé y figurant a été formellement confirmé par la convention franco-britannique du 8 septembre 1919 qui constitue l'interprétation authentique de la déclaration.

8. En aucune manière le Tchad ne conteste que la zone d'influence que cette déclaration

reconnaissait à la France n'entraînait aucune obligation juridique pour les Etats tiers. La limite qu'elle lui assignait n'en est pas moins devenue la frontière du Tchad lorsque celui-ci a acquis le statut juridique de possession coloniale française du fait de l'occupation effective et exclusive de la région par la France : si la limite d'une zone d'influence n'a aucun caractère objectif en droit international, il n'en va pas de même d'une frontière qui, elle, s'impose à tous, sauf à remettre en cause sans cesse la stabilité des situations territoriales.

Mais il y a plus : il se trouve que, dans notre affaire, cette frontière ne s'imposait pas à l'Italie seulement parce que la France était là et qu'elle-même ? l'Italie ? n'y était pas, ce qui serait pourtant une raison suffisante. L'Italie en effet, dès 1900, a reconnu la sphère d'influence réservée à la France par la déclaration de 1899 sous réserve qu'elle ne dépasse pas la limite du *vilayet* de Tripoli et, deux plus tard, les deux Etats s'entendaient pour admettre que "par la limite de l'expansion française en Afrique septentrionale ... on entend bien la frontière de la Tripolitaine indiquée par la carte annexée à la déclaration du 21 mars 1899". La frontière figurant sur cette carte qui, les deux Parties en sont d'accord, est celle du *Livre jaune*, est d'ailleurs la même que l'on retrouve sur toutes les cartes de l'époque et qui était ? je me borne à reprendre les termes mêmes utilisés par la Libye ? "commonly regarded at the time to be the Tripolitanian border" (contre-mémoire, p. 237, par. 4.254). Du même coup, se trouvait précisé également le secteur occidental de la frontière.

Désormais, l'Italie ne pouvait contester la légitimité de la présence française au-delà de cette frontière à moins qu'un nouveau traité, conclu entre les deux Parties, modifie cet engagement. Or celui-ci, non seulement n'a pas été modifié, mais il a été formellement réitéré en 1912. Et si, par le pacte de Londres de 1915, la France avait, sans aucun doute, pris l'engagement d'accorder à l'Italie "quelques compensations [coloniales] équitables", cet engagement s'est éteint en 1947, lorsque Rome a renoncé "à tous ses droits et titres sur les possessions territoriales italiennes en Afrique". Au surplus, le Tchad voit mal comment il pourrait, lui, être tenu d'honorer une promesse française, de caractère général et qui ne peut, par essence, que reposer sur une puissance coloniale ? ce qu'assurément le Tchad n'est pas !

Ainsi dès 1899-1919, la frontière était fixée. Elle n'a pas changé depuis lors.

9. Monsieur le Président,

En 1955, les deux Parties ont donc confirmé que leur frontière suivait la ligne décrite par les accords que je viens d'évoquer : 1899, 1902 et 1919. Il n'y a ni surprise, ni hasard à tout cela, contrairement à ce que feignent de penser nos contradicteurs libyens. C'est tout simplement le reflet d'une situation stabilisée sur le terrain depuis longtemps et consacrée par des actes internationaux que les deux Parties s'accordent à reconnaître comme étant en vigueur à la date de l'indépendance du Royaume-Uni de Libye.

Mais cette continuité historique se double d'une véritable *novation* juridique, au sens que les civilistes attribuent à l'expression. L'obligation juridique relativement au tracé de la frontière est renouvelée, fondée sur une nouvelle expression de volonté, émanant clairement et directement des deux Etats souverains concernés, la France et la Libye indépendante. Tout doute qui aurait pu exister sur la validité ou l'opposabilité des texes de référence est dissipé par la claire affirmation de leur applicabilité pour déterminer la ligne frontière.

La Partie libyenne reconnaît que le traité de 1955 ne souffre pas de discussion, du moins dans son principe. Elle n'invoque pas à son encontre de vice de consentement ou de cause d'inopposabilité à l'une ou l'autre partie. Ce faisant, elle limite le différend à un problème d'interprétation du traité du 10 août 1955 et, sur ce point, elle a raison.

Monsieur le Président, l'interprétation des traités repose sur un ensemble de règles, bien établies et unanimement acceptées, que la Partie libyenne évite de mettre en œuvre. Car si elle procédait systématiquement, elle mettrait à nu inévitablement les faiblesses de son argumentation. Aussi nos contradicteurs préfèrent-ils procéder par touches impressionnistes, allant directement aux travaux préparatoires, imaginant des scénarios très hypothétiques, cherchant à faire prévaloir la volonté supposée d'*une partie* sur un texte clair.

Comme vous le savez, nous avons procédé autrement. Partant du principe fondamental en matière de traités établissant une frontière, celui de la stabilité et de la sécurité des lignes frontières, nous avons examiné l'article 3 du traité du 10 août 1955 ainsi que l'annexe I. Nous avons éclairé ces dispositions par la prise en considération de l'objet et du but du traité. Nous les avons replacées

dans leur contexte et nous avons tenu compte des accords ultérieurs des Parties qui pouvaient en préciser le sens.

Le recours à la méthode générale d'interprétation nous a permis de dégager le sens raisonnable de cette disposition, sans qu'il soit besoin d'aller plus loin.

Dans un second temps, nous avons tout de même constaté que l'examen des travaux préparatoires ? que nous ne lisons pas de la même manière que nos contradicteurs (mais les lisent-ils vraiment ?) ? et des circonstances entourant la conclusion du traité, confirment le sens dégagé par l'analyse du texte.

En passant, nous avons écouté les hypothèses échafaudées par la Partie libyenne, qui ne reposent sur rien et sont infirmées par les documents relatifs à la négociation de Tripoli de juillet-août 1955 que la Libye n'a d'ailleurs communiqués à la Cour que d'assez mauvaise grâce.

L'interprétation que nous proposons permet de déterminer "une frontière précise, complète et définitive" pour reprendre l'expression de la Cour permanente dans l'affaire de l'*Interprétation du traité de Lausanne* (*C.P.J.I. série B n° 12*, p. 20). En revanche, l'interprétation que propose la Partie libyenne prive l'article 3 et l'annexe I du traité du 10 août 1955 non seulement de tout effet utile, mais encore de tout sens, de toute portée normative.

Aussi, Monsieur le Président, la conviction de la République du Tchad est que le traité du 10 août 1955 fournit, décidément, à lui seul, la réponse à la question que l'accord-cadre et les instruments de notification des Parties vous ont posée. Cette réponse est simple, trop simple aux yeux de nos adversaires. Mais elle nous paraît inévitable, indiscutable.

10. Pour me résumer, Monsieur le Président, la République du Tchad croit, plus que jamais que sa frontière avec son voisin du nord est fermement et clairement fixée :

? elle part de l'intersection du 24e méridien est de Greenwich et du parallèle 19° 30' ? ceci résulte de la déclaration de 1899 et de l'interprétation authentique qu'en donnent la carte du *Livre jaune* et la convention du 8 septembre 1919;

? elle se dirige ensuite vers l'intersection du tropique du Cancer et du 16e degré est de Greenwich ? ici encore, les accords franco-britanniques de 1899 et de 1919 sont formels; en outre, par

l'échange de lettres daté du 1er novembre 1902, l'Italie a formellement accepté la frontière de la Tripolitaine-Cyrénaïque figurant sur la carte de 1899 qui passe par ce point.

? la frontière s'infléchit ensuite vers le sud-ouest, en direction de Toummo, comme l'atteste le tracé figurant sur cette même carte, acceptée par l'Italie en 1902 comme figurant la frontière de la Tripolitaine-Cyrénaïque;

? la frontière s'arrête à l'intersection de cette ligne avec le 15e degré est de Greenwich puisque, au-delà, s'étend le Niger, ainsi que cela résulte de l'arrêté du gouverneur-général de l'AEF du 10 février 1930. Pour décrire ce tracé comme je viens de le faire trois accords seulement sont nécessaires et suffisants :

? la déclaration franco-britannique du 21 mars 1899,

? la convention supplémentaire du 8 septembre 1919, et

? l'échange de lettres franco-italien du 1er novembre 1902.

Ils peuvent trouver application en eux-mêmes. Mais ils sont aussi les accords qu'énumère l'annexe I au traité franco-libyen du 10 août 1955. Il n'est, Monsieur le Président, nul besoin de chercher plus loin la réponse à la question qui vous est posée.

Monsieur le Président, Messieurs les Juges,

Nos plaidoiries, finalement, et ceci me frappe beaucoup, nous ramènent très près du point de départ car, si la Libye a cru devoir vous présenter un mémoire dans lequel le droit tenait une place modeste, le Tchad a, d'emblée, exposé son argumentation juridique comme il l'avait fait auparavant à maintes reprises dans d'autres enceintes. Nous avons pu, sur tel ou tel point de détail, ajuster notre présentation mais, pour l'essentiel, nous sommes demeurés fermes dans nos convictions juridiques.

Vous avez eu, malgré ce sentiment de répétitivité que vous avez certainement ressenti aussi, la patience de nous écouter. Au nom de l'agent et de toute l'équipe du Tchad, je vous adresse, Messieurs de la Cour, nos remerciements sincères et je me permets d'en adresser aussi aux représentants de la Partie libyenne : nos échanges sont vifs car l'enjeu est vital ? en tout cas pour le Tchad ? mais ils n'altèrent pas, je pense, l'estime qui nous unit et ne nuisent pas à l'excellence de nos rapports personnels; je m'en réjouis.

Merci beaucoup, Monsieur le Président.

M. Guillaume : Je vous remercie, Monsieur le Président. J'aurai une question à vous poser aux représentants du Gouvernement de la Jamahiriya arabe libyenne qui est la suivante : Selon la Libye, les diverses conventions invoquées par le Tchad n'ont "dans le secteur situé entre Toummo et la frontière soudanaise ... fixé aucune véritable frontière" (CR 93/15, p. 64). Plus à l'ouest, "le cours de la frontière entre le point coté 1010 et Toummo n'a pas fait l'objet d'un règlement" (CR 93/15, p. 42; voir également la carte n° 14 du dossier fourni à la Cour lors des audiences). En outre, "la Libye peut citer, dans des documents établis par des autorités officielles françaises, après 1955, de nombreux cas où a été admis le fait que la frontière entre Ghat et Toummo restait à délimiter" (CR 93/15, p. 43). Dans ces diverses zones, le territoire de la Libye est contigu notamment au territoire du Niger. Une délimitation est-elle intervenue entre ces deux Etats, en particulier à l'est de Toummo, ou bien les questions mentionnées par la Libye sont-elles de l'avis de la Libye toujours pendantes ? Je vous remercie, Monsieur le Président.

L'audience est levée à 12 h 30.

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1993

Public sitting

held on Tuesday 6 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mardi 6 juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajobola
	Herczegh
Judges *ad hoc*	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramadane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please by seated. This morning we begin the second round of pleadings from Libya. Mr. Maghur, please.

Mr. MAGHUR: Mr. President, Members of the Court, at the outset of Libya's rebuttal, permit me to remind the Members of the Court of what Libya regards to be the three main questions to be resolved by the Court in this territorial dispute submitted by the Parties under the *Accord-Cadre*:

First, did the 1955 Treaty create a territorial boundary between Libya and Chad that did not already exist? Libya submits that it did not,

Second, to the extent that it did not — in other words, to the extent that the 1955 Treaty was simply declaratory of the existing boundary situation, was there a conventional boundary between Libya and France concerning territory now lying between Libya and Chad on the date of Libya's independence, 24 December 1951, the critical date in this case?

Libya believes it has amply demonstrated that there was not.

Third, if there was no such conventional boundary, then where does such a boundary lie based on a determination of which of the Parties has established title to territories lying within the Libya-Chad borderlands?

Chad's Agent asserted that the dispute before the Court goes back only 20 years — to 1973, when Libya — and I am translating his exact words — "taking advantage of the civil war raging in Chad, established itself in the region of Aouzou" (CR 93/21, p. 13). The only question, he said, aside from Libya's alleged occupation of Aouzou by what he wrongly described as "force", is a simple matter of *demarcation*. In other words, there is no question of *delimitation* at all for the Court to consider.

It almost seems as if Chad now regrets having signed the *Accord-Cadre*. Well, Libya does not. There is — and has been for *over 100 years* — a territorial dispute to be resolved. It is now of great importance that this dispute be settled. Until resolved, it remains a thorn in the side of the full resumption of friendly relations between Libya and Chad, and a matter of uncertainty for the people living in the borderlands.

The only aim and desire of Libya in bringing this case to the Court is to resolve this dispute, definitively, in accordance with the principles and rules of international law. The case Libya presents to the Court is *not*, as Chad's Deputy-Agent suggested (CR 93/25, p. 23), a facade — a thin veil of supposedly applicable legal principles — behind which lurks Libyan expansionist appetites. Libya does not want one inch of Chad's territory. Rather, Libya has come to the Court to find out what Libya's territory and what is Chad's based on the facts and the law.

I have to pause here, Mr. President, with regret, to mention that the Court heard counsel for Chad three times refer to a parallel between Mussolini and Libya. It was said that Libya, like Mussolini, seeks half of Chad. I very much regret that such a comparison was drawn, for I would not have thought it necessary to remind counsel for Chad of the suffering which Libya was subjected to under the fascist régime. I will not say more on this point.

When Chad brought a complaint against Libya to the United Nations in February 1978, some *five* years after Libya was administering the northern sector of the borderlands, Libya's representative had this to say — and it seems very pertinent today:

> '" If there is a Libyan administration now in Aouzou, or anywhere else in Libya, there is a simple explanation. After the revolution people began to take an interest in the interior and the construct hospitals, schools, administrative centres and regions on the frontiers between us and Chad and other neighbouring countries.
>
> . . .
>
> We say we are in our country, you say we are in yours. You say it is Chad. We say it is Libya. This is a classic frontier problem."

And it is *this classic problem* that has been submitted for resolution to the Court.

As the Court witnessed, Chad's oral presentation began in a startlingly political fashion.

Mr. President, I was for a time Libya's representative to the United Nations. Throughout Chad's presentation I felt I was back in New York at United Nations Headquarters again — not here in The Hague before the International Court of Justice. The Agent and I say here and heard Libya accused of such things as:

— Insidious interference in Chad's internal affairs;

— Trying to destabilize all of Africa and to claim the territory not only of half of Chad but of Niger, Algeria and even of non-neighbouring States;

— Practising charity but not so as to benefit Chad. Let me quote Chad's Agent here: "Bien sûr, je ne conteste pas que la Libya pratique la charité mais je doute que le Tchad en soit le bénéficiaire." And similar accusations appeared throughout Chad's oral presentation, especially in the last day.

What a paradox! Chad attempted to try its legal case before the Security Council and General Assembly. And Chad criticizes Libya for not having followed suit. Now, Chad comes before a judicial institution — the Court — to present its *political* case; while at the same time intimating that Libya also seeks to use the Court for the political purpose of defending its activities in the northern part of the borderlands. This is false. Libya is here to present a *legal* case and nothing else.

The Court will recall that Professor Higgins suggested that Chad's internal problems, which fuelled the debates before the United Nations, really began in 1969 when the Libyan Government changed (CR 93/26, pp. 10-12). In fact, the problem started in 1965 when the French left, and the rebellion *actively* began in 1968, *before* the change in the Government of Libya. But in spite of Chad's ferocious political attacks against Libya before the United Nations, in the late 1970s and the 1980s, *no* resolution of any kind condemning Libya resulted either before the United Nations or the OAU. Libya *denied* Chad's politically inspired accusations at the time and Libya denies them here today since, as Chad well knows, the time and Libya denies them here today since, as Chad well knows, the situation was largely a product of internal Chadian instability.

While those are the facts, the important point is that Libya and Chad are before a court of *law* today, and have submitted a *territorial dispute* of a *legal* nature — *not* a political dispute — to the Court's Statute. This fully accords with Article 36 (3) of the *Charter* which provides the "*legal* disputes should as a general rule be referred by the parties to the international Court of Justice in accordance with the provisions of the Statute of the Court".

By the same token, when Chad's Agent said that Chad was not the beneficiary of Libya's generosity, I had to wonder what he meant. Chad's Agent knows even better than I that the roads, the schools, the medical facilities and help, and the food that sustained the peoples of the borderlands, which kept them alive and helped to improve the desperate situation into which they had

fallen after years of colonial neglect, was paid for almost entirely by Libya and supported by Libyan technical assistance.

Yet, again, this is not really the point. For Libya and Chad come before the Court as *equals* under the law, not as rich, powerful Libya, on the one hand, and poor, weak chad, on the other, as Chad's Agent would suggest. When I think back to Libya's situation in the 1950s, I am aware of the truth of the Court's statement in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the economic considerations are "virtually extraneous factors since they are variables which unpredictable national fortune or calamity . . . might at any time cause to tilt the scale one way or the other" (*I.C.J. Reports 1982* p. 77, para. 107).

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Another point mentioned by Chad's team concerned the fact that in January 1955, the French Government placed listening devices in rooms in Paris used by Libya's Prime Minister. I think the popular term for this is "bugging" that show, *on their face*, that they were recorded by listening devices. These transcripts were supplied form the archives of the Quai d'Orsay, *not* through some sort of counter-espionage operation, as Professor Cot suggested. Libya will gladly furnish the file of documents in which this evidence was found unjust the form received from the Quai d'Orsay. A sample of these transcripts were furnished with Libya's Reply (Exhibit 6.4). But what there transcripts brought out, among other things, is that Libya did not wish or intend to deal with the delimitation of Libya's boundaries in the 1955 Treaty. So this odd place of *travaux* confirmed and reinforced the Libyan *travaux* that Libya has furnished in this case.

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Libya's claim extends as far south as 15° N latitude not because of territorial greed, as Chad would have the Court believe, but because of historical facts. It is true that 15° N latitude marks roughly the geographical separation between the Sahara and the zones of the more fertile Sahel and Savannah to the south — and that this separation is reflected in the nature, the lives and event the religion of the peoples to the north and south. Professor Cot kindly presented again Libya's maps illustrating this fact last week. So geography is certainly a basis for the selection of this line. But the line of 15° N latitude is significant for a whole host of other reasons: as Libya's Agent said, it was not just "pulled out of a hat". Such reasons include the following:

— In 1899, Italy made it clear to Great Britain that any acts affecting territorial rights north of 15° would affect the status quo of the Mediterranean, which had been guaranteed by treaty; and Great Britain assured Italy that the 1899 Declaration had no such effect;

— The only boundary delimited under the 1899 Declaration was Article 2 boundary, which, as you can see form the map on the screen, included the shaded area to be delimited that went no further north than 15° latitude;

— The *de facto* line between the Ottomans and the French during the *modus vivendi* that lasted from 1909 to mid-1913 lay roughly along 15° latitude;

— France's most northerly military post during this period was at Arada, which lies almost exactly on the 15° line, and in the French negotiations with the Senoussi, conducted by M. Bonnel de Mezières, Arada was suggested — and appeared acceptable to the Head of the Senoussi — as a point on the boundary in the eastern sector of Libya's southern boundary;

— The 1911 proposal of the *vilayet* of Tripoli to reduce the 1890 Ottoman claim suggested a line that descended as far south as 15°;

— The 1928 Minimum Program of *Italy* — not of Mussolini — went south to 15°;

— In more recent times, the initial *ligne rouge* drawn by the French in 1983, after deploying some 2,500 troops in Chad, was along 15° N latitude.

Libya's claim line thus marks the part of the borderlands to which Libya believes it has title. This is a matter for the Court to decide; and Libya has set out a number of relevant factors for the Court take into account in arriving at its decision.

Have made these preliminary remarks, I should like to turn next to several other issues:

— *First*, a matter that has procedural as well as substantive implications. This concerns the issues of importance in this case not adequately addressed by Chad, and the consequences of Chad's failure;

— *Second*, evidence produced the positions taken by Chad from which it now, apparently, seeks to resile; and

— *Third*, the question of maps.

In counsel's presentation, Libya will indicate for the Court the principal matters of substance in this case not adequately addressed in Chad's written pleadings, or in these oral proceedings, for the issues concerned to have been truly joined. It will be recalled the attention was brought to this fact in my pleading during the first round. There, I noted that in both international and domestic practice the failure to address points of evidence and arguments of an adversary may well result in a tribunal's construing such failure as tantamount to admission.

There is a second procedural point to be made, as well. This is that for the party who has the last word in oral proceedings, such as these, to fail to address issues prior to the final pleading, and, as a result, to be able to make points of substance that its adversary will not have the opportunity to address at all, is an abuse of procedure.

Moreover, I shall also note that we were struck by several glaring inconsistencies between the presentations of Chad's advocates. My colleagues will also discuss these during their presentations.

I turn, next, to evidence produced, and positions taken, by Chad that it now seeks to disavow, ignore or otherwise distance itself from.

First, I was struck by the fact that Chad tried to explain away virtually every agreement entered into with Libya after Chad's independence, even to the extent of arguing that certain persons did into have the authority to bind Chad. We will show that Chad's position on these arguments is untenable.

Next, there was Chad's complete *volte face* on the Senoussi. In Chad's Memorial the significance of the Ottoman assertion of direct control in the borderlands, starting in 1908 and ending in mid-1913, was sought by Chad to be side-stepped by French documentary evidence that the Senoussi were in *firm control* of the borderlands at the time and that the Ottomans constituted a pathetic straggle of soldiers virtually held hostage by the Senoussi. Now, in oral argument, Chad disputes that the Senoussi ever had real control.

I have already cited during the first round some of the evidence on which Libya relies to show the extent of the Ottoman-Senoussi *co-operation* and the fact that the Senoussi paid allegiance to the Caliph. Some of this evidence was discussed in Part IV of Libya's Memorial; but important new documentary evidence was produced with Libya's Reply and discussed there. Chad has not addressed any of this evidence — its written pleadings just state conclusions based on erroneous and biased French reports. And here in the oral proceedings, Chad simply repeated these incorrect conclusions or made declaratory statements as if they were evidence being presented by an expert witness.

Mr. President, not only did Libya's Reply include important new evidence, but in Volume 2, Supplementary Annex No. 3 of that pleading may be found a detailed, and *undeniably* expert analysis of the Senoussi-Ottoman relationship. Chad just ignores this evidence, despite the fact that it concerns a major element of proof establishing Libya's title to the borderlands.

In this connection, there are four points that must be emphasized which Professor Shaw failed to reflect properly. *First*, the nature of Islamic and Ottoman sovereignty very much included the concept of shared sovereignty and delegated power. Thus, it was perfectly natural for the Senoussi and the Ottomans to exercise jointly the attributes of sovereignty in the borderlands. Now, *second*,

the Senoussi through their *zawiyas* performed important administrative functions, particularly in the field of dispute settlement, and were not simply a religious order or group of dervishes. *Third*, Ottoman-Senoussi governmental authority and control extended throughout the borderlands up to 1913, with the Senoussi presence and control continuing thereafter. And *fourth*, Ottoman control was acknowledged by France.

To the extent there were French protests, they were directed against the Ottoman assertion of sovereignty. But the existence of Ottoman authority and control over the borderlands was accepted by France pending the resolution of the Tripolitanian boundary issue at the conference table. Chad not only seeks to downplay the *modus vivendi* that came into being and which is so fully established by French documents in evidence in the case, it also implies that the "arrangement passager" was to protect France's neutrality. This is simply not true: the *modus vivendi predated* the outbreak of the Italo/Ottoman war.

And of course Ottoman control was peaceful. The Ottomans, unlike the French later on, were accepted by the local peoples of the borderlands and by the Senoussi, a matter once more established by evidence produced by Libya.

A second major piece of evidence introduced by Chad, which it has subsequently sought to discredit, that piece of evidence concerns the Tombalbaye letter. I will leave this subject to my colleagues to take up later on. I only note now that Chad has almost totally ignored the point established by Libya in the first phase of these proceedings that the new material introduced by Chad covering the period 1972-1974 establishes the fact that, quite apart from the Tombalbaye letter, there existed an unresolved territorial dispute in the view of both Libya and Chad.

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Mr. President, I now turn to the question of maps used in these proceedings, a matter first brought up by Chad's Deputy Agent, I am sorry, in a distasteful way — as if Libya were trying to

mislead the Court and, as he put it, like soap salesmen, attempting to put on a slick publicity show in order to sell a defective product. Those are his words. I hope I translate them the way they are in French.

While I am sure there may be a few inadvertent errors on some of Libya's maps in spite of the technical competence of those preparing them and Libya's efforts to make them as accurate as possible, Libya has given a great deal of attention to its maps in an effort to bring clarity to the points in issue. Our purpose has been to assist the Court.

Let me turn to certain specific remarks of Chad's Deputy Agent on the subject of Libya's maps. He referred to a map in Libya Reply (CR, 25 June, p. 27), and he suggested that Libya had touched up or enhanced a line on this map so as to modify the line's meaning as defined in the map's legend.

Mr. President, this is a very serious accusation which, later in this rebuttal, Libya will demonstrate is totally wrong. We will also focus on some of the plainly incorrect conclusions that Chad attempts to derive from the maps.

For the purposes, let me mention just one of the misleading tactics of Chad's map analysis.

Last Thursday, Professor Cot sought to impress upon the Court that the United Nations map of the boundary situation after Libya's independence reflected a "consensus" on what the international community considered the boundary to be — the 1919 line (CR 93/25, p. 39).

Mr. President, distinguished Judges, the facts do not bear Professor Cot's assertions out.

One of the maps that he placed on the screen was a 1963 map prepared by the United Nations (No. 141 in Chad's Atlas). I have had this map put back up on the screen because I fear that in his haste, Professor Cot neglected to draw an important feature of this map to the Court's attention. While Professor Cot pointed to the line which he said confirmed "the quasi unanimous international consensus" on the boundary, he forgot to read that caption that accompanied this line which appears here on the map and which is being shown up on the screen so that you can read it. As the Court can plainly see, it reads: "The boundary shown on this map do not imply official endorsement or acceptance by the United Nations."

Now virtually the same disclaimer appears on the other United Nations map that Chad has

produced. So, if we look at the United Nations map from No. 147 of Chad's map Atlas, we see the same caption. The important point is that the United Nations maps clearly reflected the fact that the boundary question remained open and that, prudently, the United Nations did *not* endorse or accept any line shown on the amps. This can hardly be characterized as confirming a "quasi unanimous" international acceptance of the 1919 line.

Nor was Chad's treatment of the Libya's maps any better. For example, Professor Cot put up on the screen No. 142 from Chad's Map Atlas, to which he said Chad attached particular importance (CR 93/25, p. 45). Now this was the geological map prepared for the Libyan Government in 1962, which purported to show the 1919 line. But Professor Cot chose to play down the very clear *disclaimer* appearing on the map which specifically stated: "International boundaries as illustrated herein are neither *final* nor *binding* on the Libyan Government." (Emphasis added.)

So here is a *clear* statement of Libya that the boundary as shown on the map was *not final* or *binding*, exactly the opposite conclusion which Chad has sought to argue.

Aside from the question of the accuracy of the maps, there is the matter of the completeness of the map demonstrations. In Volume 2 of its Reply (Supplementary Annex No. 2), Libya included a detailed analysis of the maps to be found in Chad's Map Atlas. While Professor Cot did make several references to that analysis, he gave no satisfactory explanation for the fact the Chad's Atlas omitted virtually *all* the relevant Italian and British maps that were shown on the screen during Libya's first round presentation and which so clearly indicated that both Great Britain and Italy interpreted the south-east line of Article 3 of the 1899 Declaration as a *strict* south-east line. The Italian maps also established Italy's official position that the wavy, dashed line around Tripolitania on the *Livre jaune* map was *not* a conventional boundary and that east of Toummo, *no* conventional boundary existed. These maps make nonsense out of Chad's theory of Italian acquiescence.

Professor Higgins on the opening day of Chad's oral presentation, said the following on this subject: "Italy did sometimes claim that the frontier was unsettled, as certain maps of the period show."

Mr. President, Members of the Court, except for a brief period just after 1935, every single official Italian map from 1906 to 1941 showed there to be *no* southern boundary *east* of Toummo.

And when they depicted the south-east line of Article 3 of the 1899 Declaration — but not, of course, as a boundary — every single one of these maps — just as every one of the pre-1919 British War Office maps — showed that line to be a strict south-east line.

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Mr. President, the final matter I should like to address was raised by Professor Pellet in his first intervention (CR 93/22, pp. 74-75). At that time, Professor Pellet raised the spectre of Libya's claims "amputating" part of Niger's territory if they were to be accepted by the Court (CR 93/22, pp. 74-75). To illustrate his point, Professor Pellet placed on the screen a map of which Libya's claim line was *artificially extended* by a series of dashed lines well into Niger's territory. Here is what Chad tried to show.

The Court will see that this is a "scare tactic". Libya has advanced *no such claim*. It is a figment of Professor Pellet's imagination. As the Court can perfectly well see from the map appearing as No. 32 in Libya's Reply, and now on the screen, Libya's claim in no way trespasses on Niger.

Mr. President, the situation before the Court is very clear. The Court's jurisdiction in this case is defined by the *Accord-Cadre*. Article 2 of the *Accord-Cadre* provided that, absent a political settlement of the dispute, the *two* parties — Libya and Chad — would submit *their* territorial dispute to the Court. There was no question of submitting a dispute involving a third State not party to the *Accord-Cadre*. Only the dispute between Libya and Chad is submitted to the Court's jurisdiction.

And, as is also perfectly clear, under Article 59 of the Court's Statute, "the *decision* of the Court has no binding force *except between the parties and in respect of that particular case*". So any decision on Libya's claims — as well as on those of Chad — will only be binding as between them, but not on any third States, which, in any event, have always had the disposition of Article 62 of the Court's Statute available to them if they felt their legal interests were affected.

The situation is not essentially different from that confronted by the Chamber in the *Frontier Dispute* case. Coincidentally, in that case, as well, the question of Niger's interests arose in connection with the determination of the end-point of the Burkina Faso-Mali frontier which lay on the frontier of Niger.

This fact in no way prevented the Chamber from deciding, to use the Chamber's own words, "the whole of the *petitum* entrusted to it . . . the line . . . over the *entire length* of the disputed area" (*I.C.J. Reports 1986*, p. 579, para. 50, emphasis added). In so doing, the Chamber emphasized that it was only deciding the frontier between Burkina Faso and Mali, and that this would "not amount to a decision by the Chamber that this is a tripoint with affects Niger". As the Chamber stated: "In accordance with Article 59 of the Statute, this Judgment will also not be opposable to Niger as regards the course of that country's frontiers" (*ibid.*, p. 580). Thus, just as Niger's interests were protected in the *Frontier Dispute* case, so also will Niger's interests — as well as those of other States, if any — by fully protected here.

So Chad's alarmist claim of an "amputation" of Niger's territory accords neither with Libya's claim, nor with the normal protection offered by the Court's Statute and jurisprudence. Indeed, Mr. President, there is a ceratin irony to Professor Pellet's claim of "amputation"; for he told us that in 1930 the whole of the Tibesti was transferred from the AOF (Afrique occidentale française). So if there has ever been an "amputation" of Niger's territory, it has been by France, not by Libya.

Chad has raised this issue for a particular reason that has a direct bearing on the boundary claimed by Chad. This concerns the sector of the boundary claimed by Chad lying between the intersection of the Tropic of Cancer and 16° E longitude and the point of intersection of the Niger-Chad boundary with the straight line drawn form the Tropic of Cancer intersection point and Toummo. It is easier to visualize this segment by showing it on the screen: it is this segment — that is the western segment — as shown on the screen of the two-segment boundary claimed by Chad. I will refer to it as the "Western segment".

The "western segment" is the "Achilles' heel" of the Chad's claimed boundary, for there is not event the semblance of a conventional basis for such a boundary. And Chad has not established any other legal basis to support the western segment. All Chad's emphasis has been on the eastern

segment; very little has been said by Chad about the western segment. However, Libya in the rebuttal will have a lot to say about it. And the false issue of an amputation of Niger's territory is a "bogeyman" designed to detract attention from the basic problem in Chad's case concerning the western segment of its claimed boundary.

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That concludes my remarks, Mr. President, I thank the Court for its patience. Libya's counsel will continue our presentation and deal with the essential points that Chad has advanced. I would ask, therefore, Mr. President, if you would call on Sir Ian Sinclair. Thank you.

The PRESIDENT: Thank you very much, Mr. Maghur. Sir Ian.

Sir Ian SINCLAIR: Mr. President, Members of the Court, I would like to respond briefly to some of the points made by Professor Cot in his pleading of 25 and 28 June on the interpretation of the 1955 Treaty, and at the same time to amplify some of the arguments I presented on this aspect of the case in my own address of 15 June. I propose, Mr. President, in addition to take up some of the arguments presented by Professor Franck on the handling of the Libyan question in the United Nations in 1949 and 1950, and also to comment on other of the presentations made by Chad's counsel which relate to the interpretation of the 1955 Treaty.

I am glad to note at the outset that Chad continues to attach as much importance and significance to the 1955 Treaty. But I fear not. The presentation made by Professor Cot could suggest that he and I are in fact reading different treaties. Let me give the Court a few examples.

Professor Cot seeks to interpret the second paragraph of the preamble as meaning that the parties intended to regulate *all* the questions posed for the two countries by their geographical situation and their interests in Africa. this paragraph expressing the willingness of both parties not to

allow any dispute to persist between them in this regard. But, with all respect, Mr. President, this is altogether too grandiose a construction of an introductory paragraph declaring the conviction of the parties that a treaty of friendship and good neighbourliness "will *facilitate* the settlement" of all these questions. The preambular paragraph does not say that the treaty itself provides the solution to all these questions; it is simply expressing the sentiment, familiar to those versed in the diplomatic niceties, that the conclusion of a treaty of friendship will be creative of an atmosphere in which questions not regulated, or not regulated fully, in the treaty will be settled. In the English language, we have an expression about making a mountain out of a molehill. It could well be applied to Professor Cot's argument on this point. It is indeed this inflation of language which permeates much of the argumentation so ably advanced by Professor Cot. But it can be creative of serious misunderstanding. Another example is furnished by Professor Cot's bald assertion that "la définition des frontières . . . est incontestablement un des objets du traité". That the treaty has something to say about boundaries is of course not contested. But that it was designed to "define" boundaries throughout the whole length of the territory dividing Libya, on the one hand, from the French possessions of Tunisia, Algeria, AOF and AEF, on the other hand, remains to be established from the terms of the Treaty itself and circumstances of its conclusion.

Counsel for Chad seeks to rely on the principle of effectiveness and on a *presumption* that the parties to the 1955 Treaty intended to define their common frontier in a definitive manner and throughout its entire length; and he prays in aid passages from the advisory opinion of the Permanent Court in the case concerning the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* and from the Judgment of this Court in the *Temple of Preah Vihear* case. But the Court will hardly need reminding that the circumstances of these two cases differ radically from the circumstances of the present case. In the first case, Article 3, paragraph 2 of the Treaty of Lausanne required the frontier between Turkey and Iraq to be "laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months", failing which the dispute was to be referred to the Council of the League of Nations. So it was clear and undisputed that the object of Article 3, Paragraph 2 was to *establish* a frontier between the two States. This being the position, it is only logical that the Permanent Court should have deduced from this common intention to

second case — the *Temple of Preah Vihear* case — the passage cited by Professor Cot occurs in the middle of the Court's discussion of the relationship between the map and the treaty settlement. As one of the arguments advanced by Thailand was that the map line was in error because it departed from the line of the watershed, it was again only natural that the Court should have stressed the importance of the concepts of stability and finality. In both these cases, there was no dispute between the parties that the treaty provisions in question were designed to establish frontiers. In any event, Mr. President, why should one seek to rely on a *presumption* when the text of Article 3 itself, read with the *travaux préparatoires*, so clearly establishes that it was *not* common intention of France and Libya in 1955 to fix a frontier along the entire length of the territorial dividing line separating Libya from French possessions? What they were doing, and the language of Article 3 clearly confirms this, was to *recognize* certain boundaries already established by treaty between France and Other Powers (in this instance, Italy and the Ottoman Empire) as boundaries between France and Libya. They were not engaged in fixed boundaries in sectors where there was no existing boundary. The *travaux* and the subsequent practice of the parties unhesitatingly confirm this view of the matter. In my first intervention, I drew attention to the evidence in the *travaux* which establishes the *absence* of any common intention to fix boundaries in those sectors where no boundaries had previously been fixed. On the French side, there is of course the letter from the Governor General of the AEF of 2 May 1955. There are also the draft provisions for inclusion in the treaty which Ambassador Dejean brought with him to Tripoli at the opening of the second round of negotiations in July 1955, one of which would have specifically incorporated in Article 3 a paragraph to the following effect:

> "To the east of Toummo the delimitation of the boundary will be the subject of a later convention between the High Contracting Parties."

The fact that this paragraph was not introduced into the final text of Article 3 is of course entirely consistent with the fact, which Chad has not sought to deny, that there was no discussion whatsoever of the alleged boundary east of Toummo during the negotiations in January and July 1955.

So, even if there were such presumption as Professor Cot contends for (which Libya firmly denies, at least in relation to Article 3 of the 1955 Treaty), that presumption is comprehensively rebutted by the evidence of the *travaux*.

The subsequent practice of the parties in fact provides further confirmation of the conclusion that the parties did *not* intend in 1955 to delimit boundaries in sectors where no boundary existed, and certainly did not intend to define their common frontier definitively and throughout its entire length. Chad can hardly deny, for example, that the ink was hardly dry upon the signature of the 1955 Treaty before France was seeking a further rectification or clarification of the boundary line between Ghadamès and Ghat in the vicinity of the Edjelé oil field — a goal which France achieved in the Exchange of Letters of 26 December 1956. Chad equally can hardly deny the numerous admissions made by senior French officials subsequent to 1955 that the boundary between Ghat and Toummo remained to be delimited, notwithstanding the terms of Annex I to the 1955 Treaty. In my first statement to the Court, I cited passages from notes by the "Service du Levant" of the Quai d'Orsay dated 15 july 1958 and 11 February 1960, which clearly indicate that the boundary between Ghat and Toummo remained imprecisely defined even after the conclusion of the 1955 Treaty. To this evidence, I would now add the following. In May and June 1960, French officials began to express concern about the problem posed for oil companies by the overlapping of exploration licences in the vicinity of the supposed boundary between Niger and Libya, particularly in view of the lack of any agreed line between point 1010 and Toummo. In responding to a letter from the Secretary-General of the French Community drawing attention to this problem, the French Foreign Minister at the time, M. Couve de Murville stated in an undated letter (but almost certainly sent in June 1960):

> As you know, a large part of the Franco/Libyan boundaries remains imprecise. Only the section running from Ghadamès to Ghat has been fixed by the 1955 Treaty, and, moreover, the demarcation, to which we have proceeded unilaterally, has not been recognized by the Libyan Government. To the sought of Ghat, the text of the treaty only gives general directions marked by some characteristic points. Now, in any boundary negotiation ceratin concessions have to be made from one side or the other. If we ourselves propose to defend the most favourable line between point 1010 . . . and Toummo, that is to say, in the Libya/Niger sector, where the oil prospectors have already found encouraging signs, we could be forced to agree to give up in other sectors of the Sahara which could also be of interest." (RL, Exhibit 6.10.)

Thus, some five years after signature of the 1955 Treaty, we find the French Foreign Minister conceding that a large part of the Franco-Libyan boundary remained imprecise and indeed envisaging that further negotiations with Libya will be necessary. What could be further removed from the argument advanced by Counsel for Chad that the 1955 Treaty had achieved and effected definitively the delimitation of the Franco-Libyan frontier along its entire length from the Mediterranean to the Sudanese border? Of equal interest is a despatch from M. Sebilleau (French Ambassador to Libya at the time) to the French Foreign Minister of 13 June 1960, which also discusses this problem of overlapping of concessions. He reports that oil prospectors from a company working in Libya had come south from Libya and worked in what he called Chadian territory between 9 January and 18 March 1960. Almost simultaneously oil prospectors from the Bureau de Recherches de Pétrole had undertaken, from Chad, a deep reconnaissance into Libyan territory. Ambassador Sebilleau's conclusion form all these developments was:

> "It is thus likely that, sooner or later, the definition of the Franco-Libyan boundary between the Ghat and the Sudanese border will become necessary. I continue to think however that such a definition should not be sought outside a comprehensive settlement of the boundary problem, without a Libyan initiative and with a Government whose continued existence at the end of the summer is open to question." (RL, Supplementary Annex No. 6.10, pp. 7-8.)

So, here again, we have a distinguished French Ambassador, some five years after conclusion of the 1955 Treaty, envisaging the future *definition* of the Franco-Libyan boundary between Ghat and the Sudanese border. Note that I say "definition". This is not, as Professor Higgins would have us believe, a casual misdescription based upon the lack of knowledge of the writer of the difference between "delimitation" and "demarcation". This was an eminent French Ambassador writing specifically about boundaries. And what he says simply confirms the compelling evidence form other sources that, even as late as the 1960s, French officials consistently acknowledged that the sector of the Franco-Libyan boundary running from Ghat through Toummo to the Sudanese border had not been delimited, far less demarcated, by the 1955 Treaty.

Of course, Chad seeks to argue that some of the passages I cited in my opening statement from the notes by the "Service du Levant" of the Quai d'Orsay are counterbalanced by other passages in the same notes attesting to the fact that the demarcation of the frontier between Toummo

and the Sudanese border should not give rise to any difficulty. Libya does not contest that the two notes contain the passages cited by Professor Cot for drawing attention to them. For in fact they attest to the persistence of the French thesis that a southern boundary of Libya had inevitably "resulted from" the international acts listed in Annex I. It is the French *thesis* which Libya believes to be, and indeed always to have been, profoundly mistaken. Libya does not doubt that the French authorities in 1955 wished to see the delimitation and indeed demarcation of what they considered to be the boundary between Toummo and the Sudanese border. But they were constrained by the wise advice of the Governor-General of the AEF not to open up even for discussion the legal basis for the French thesis that the southern boundary of Libya resulted from the combined effect of the Anglo-French Additional Declaration of 1899, the Franco-Italian Accord of 1902 and the Anglo-French Convention of 1919. And why was this advice given? One can only speculate, but it seems likely that the Governor-General was well aware that the Libyans would not accept the French thesis.

Mr. President, Members of the Court, I want to make it quite clear that I have drawn attention to these extracts from French official documents dating from 1960 simply for the purpose of demonstrating that the argument advanced by our opponents that the 1955 Treaty definitively established the boundaries between Libya and French possessions throughout their entire length is comprehensively contradicted by a series of frank admissions made by French officials during the following five years. Libya is *not* relying upon these extracts for any other purpose.

Now Mr. President, I should perhaps refer here more fully to the argument advanced by Professor Higgins that statesmen and civil servants often use the terms delimitation and demarcation loosely and interchangeably (CR 93/21, p. 61). There may be a measure of truth in this observation; there is certainly evidence in the documentation presented to the Court in this case that the term "cession" has from time to time been utilised inaccurately. Professor Cassese gave us some striking examples in his statement of 30 June, on which my colleagues Professor Condorelli will be commenting further. But the Court should recall that it was the French representative to the *Ad Hoc* Political Committee of the General Assembly who, on 13 December 1950, reminded the assembled delegates of the need to distinguish between:

"the concept of delimiting a boundary by international agreement, that of a demarcation

on the spot of a boundary already fixed by convention, and that of rectification of a boundary, in view of paragraphs 2 and 3 of Annex XI of the Peace Treaty with Italy".

Even if officials may occasionally use legal terms imprecisely, that cannot begin to explain the frequent references in post-1955 French archives to the lack of "definition" of the boundary or to the need to negotiate the "delimitation" of the sector from Ghat to the Sudanese border. One or two lapses might be excusable; but not constant misstatements. And I have too much admiration and respect for the French Civil Service to think otherwise. In any event, the same French officials are always careful to talk about "demarcation" when they mean demarcation, as, for example, in the case of the unilateral demarcation undertaken by the French authorities to give effect to the Exchange of Letters of 26 December 1956 (see the note from the Service de Levant of the Quai d'Orsay of 11 February, 1960 at RL Exhibit 6.9, sixth document).

Mr. President, I turn now to another feature of the arguments advanced by our opponents. Now, here I refer to what is obviously a central issue — namely, whether Article 3 of the 1955 Treaty, read with Annex I, should be regarded as declaratory rather than constitutive of the legal position. This is an issue which the Court will have to decide upon. Libya has throughout taken the view that Article 3 is declaratory of the boundary status quo as of the critical date in 1951, namely, the date of Libya's independence. Chad's position, it must be said, is more equivocal. Thus, Professor Pellet seems at one point to espouse the declaratory view of Article 3. In his view the 1955 Treaty merely "confirmed" a pre-existing frontier; it did not define that frontier *de novo*, but by reference to previous international acts. On the other hand, when he argues that the problem of opposability is irrelevant as regards Chad's first thesis, he might be thought to be embracing the constitutive view. And, indeed, later in his statement of 28 June, Professor Pellet, seems, I stress the word, *seems* to adopt the constitutive view by citing the written submissions of Chad concerning the course of the southern boundary of Libya and then adding: *"C'est exactement le tracé qaue j'ai pu retrouver sur la base du traité de 1955 et de lui seul"*. (CR 93/22, p. 81.) By way of contrast, Professor Franck clearly adopts the declaratory view; on his approach, France and Libya did not, in the 1955 Treaty constituting a sort of "renewal of vows" in the light of changed circumstances (CR 93/22, p. 44). Of course, the slightly awkward feature of this second metaphor is that if indeed

Article 3 of the 1955 Treaty constitutes a " renewal of vows" it was a renewal of vows made by others. Indeed, one might almost think that bigamy was being envisaged. Professor cot, on the other hand, is more uncertain. For him, recognition is at one and the same time both declaratory and constitutive. And he seems to argue that the phrase refers to the three points between Ghat and Toummo) must, on Liyba's submission this is to misconstrue the object and purpose of that part of Annex I relating to the three pints. The Court will readily recall that the two Parties disagree as to whether the identification of the three points between Ghat and Toummo through which the boundary line should pass constitutes a *rectification* or a *clarification* of the Franco/Italian Arrangement of 12 September 1919. It is precisely the use of the phrase "il a été reconnu" which has enabled France (and now Chad) to claim that what was involved was simply a *clarification* rather than a *modification* of the earlier Arrangement.

But, Mr. President, it is Professor Cot's uncertainty on this point which, in Libya's view, leads him into error in his analysis of Article 3 and Annex I. The Court will have noted that Professor Cot made little or no reference in his statement to one of the crucial elements in Article 3, namely the condition specified in Article 3 that the international acts listed in Annex I should have been in force on the date of Libya's independence. He did of course refer to that condition in seeking to deal with the Libyan contention that it operated to exclude that taking into account of *effectivités* in the determination of a conventional boundary. That Libyan contention was of course based *inter alia* on a clear admission made by Chad itself in its Counter-memorial (at para. 11.20) interpreting this condition as excluding, and again here I am quoting form the Chad Counter-Memorial, as excluding "non-international acts, as for example administrative acts internal to the colonial powers"; and nothing that Professor Cot has said affects the force of the Libyan argument on this point.

I will have more to say later about the *"en vigueur"* requirement staed in Article 3. Professor Cot's failure to refer otherwise to the condition in Article 3 about the international acts being in force on the date of the constitution of the United Kingdom of Libya might be thought to case a measure of doubt on Chad's acceptance of this date as the "critical date" in this case. As the Corut will be aware, one of the few points on which the Parties have so far been in agreement in their respective legal analyses have been their acceptance of the date of Libya's independence as the

critical date in this case. It is therefore somewhat reassruing to note that Professor Higgins reaffirmed Chad's acceptance of 1951 as teh critical date in teh present case when she spoke on 2 July (CR 93/26, p. 29).

Mr. President, Members of the Court, there is one decisive reason why the Court should not be deceived by Chad's ambivalence on the declaratory or constitutive view of Article 3. There is clear and undisputed evidence that as early as 1950 France itsel, one of the original parties to teh 1955 Treaty, unreservedly embraced the declaratory view. In his statement to the *Ad Hoc* Political Committee of the General Assembly on 13 December 1950, the French representative (Mr. Naudy) gave his famous clarificaiton of the French position on Libya's boundaries. For the benefit of the Court, I show on the screen an english translation of the relevant passage of his statement. Copies of both the original French text of this passage, and of the English translaiton, ar in the Judges' folders.

There are two quite separate conclusions which can be drawn from this passage. First, and this responds to the declaratory.constitutive argument, the international acts cited by Mr. Naudy are virtually identical with the international acts listed in Annex I to the 1955 Treaty. The differences are in fact marginal; Mr. Naudy cites the Anglo/French Declaration of 21 January 1924, in addition to the international acts listed in Annex I to the 1955 Treaty, but this is immaterial for the purposes of my analysis. Nor is it material that the Annex I list, on the other hand, includes the France/Ottoman treaty of 1910 relating to the boundary with Tunisia, while, as your will see, Mr. Naudy's statement makes no reference to this instrument. If these international acts can be prayed in aid in 1950 in an endeavour to claim that Libya's boundary has *already been fixed* by them then it cannot be argued that the self-same acts *constitute* Libya's boundaries by virtue of the 1955 Treaty alone. The international acts in question cannot be *declaratory* in 1950 but have been rendered *constitutive* five years later by the mere cross-reference made to them in Article 3 of the 1955

Treaty. That, of course, is the main conclusion I wish to draw form that passage, but while we have this passage up on the screen I would like to indecate and this — is in fact in response to a separate point made by Professor Franck — that there is absolutely no way in which this explanation give by Mr. Naudy can be presented to the Court as a clear definition of Libya's southern frontier. Let us

just look at the egregious errors embodied in the statement.

first of all, the false reference to teh map supposely anned to the Additional Declaration of 1899, but not so annexed.

Second, the unqualified reference ot the "boundary of Triplitania" indicated on the non-annexed map, when that was no more thatn a notional boundary, uncertain and portratyed as such on the map.

Apart from these errors, the statement of course presents a conclusion ("the matter was therefore governed at present by all the texts he had just quoted") which does not logically follow from what has just been said. That conclusion would be correct if, but only if, the texts did in fact produce a boundary.

I would, however, wish to make one additional point on the question of whether Article 3 of the 1955 Treaty, read with Annex I, was declaratory or constitutive. At present, Chad has not pronounced itself definitively on whether it regards Article 3 and Annex I as being declaratory or constitutive. But Libya could envisage a scenario in which , even at this very late stage, Chad might argue that Libya is now bound to accept the line agreed in the Anglo-French Convention oi 1919 *as a boundary,* because Libya agreed to the inclusion of a reference to the Convention in Annex I to the 1955 Convention. So Libya would, on that analysis, be bound to that Convention, not as successor to Italy, but by virtue of its own agreement in 1955. Chad has not yet made the argument in these terms, but it may yet do so. And if it did, this would presumably make the boundary provisions of the 1955 Treaty truly constitutive in Chad's view.

I must say that, if an argument along these lines were to appeal to the Court, it would raise very serious questions indeed about the good faith nature of the 1955 negotiations. Libya would, on that analysis, have been induced to agree a boundary by inadvertence. Libya is therefore confident that the Court would not entertain a result of this nature. The Court will in any event recall the following:

1. The Libyan Prime Minister said in 1955 that the Libyans were not ready to discuss boundaries;

2. There was no real discussion of the southern boundary — in the sense of an examination of

maps, proposal, etc.;

3. France produced neither the text of the 1919 Convention nor a map showing the boundary France claimed to produced;

4. Annex I, identifying the 1919 Convention as a relevant text, appeared only at the last minute and in circumstances not revealed in travaux;

5. Within four days of signature of the 1955 Treaty, Libya had issued its famous May No. I annexed to its Petroleum Regulation No. !. Mr. President, you will recall that Mr. Maghur showed this map on the screen on 14 June and discussed it (CR 93/14, pp. 72-73). The southern boundary portrayed on Libya's Map No. 1 was almost the same line as appeared on United Nations Map No. 241 attached to the United Nations Secretariat study. This is sufficient in itself to show that Libya did *not* accept that the 1955 Treaty had determined Libya southern boundary in the sense of the 1919 line.

How could Libya therefore have agreed in 1955 to a line it never saw, on the basis of a text never produced to it? I need hardly remind you, Members of the Court, that a treaty embodies only what is agreed by common consent. In the circumstances, Mr. President, it is impossible to believe that Libya could have agreed in 1955 to do anything more than look at the 1919 Convention in due course as one of the texts on which future negotiations to settle the southern boundary would be based.

Mr. President, this could perhaps be a convenient point at which you might have the coffee break.

The PRESIDENT: Yes indeed, Sir Ian. We will take it now. Thank you.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The PRESIDENT: Sir. Ian.

Sir Ian SINCLAIR: Mr. President, Members of the Court, when we had our coffee break I

had just completed my discussion of the difference between the declaratory and the constitutive view of Article 3 in Annex I. There is at least one further comment which I must make on the presentations of Professors Higgins and Cot and which relates directly to the interpretation of Article 3. Chad prides itself on relying on the literal wording of Article 3 to sustain its argument that that Article, read with Annex I, effected the delimitation of the entire boundary between Libya and Chad. So what does Article 3 say? Mr. President, Members of the Court, the texts of Article 3 in the French and English are now on the screen. And what do Chad's Counsel say? I take first Professor Higgins. On 25 June, she is recorded as arguing:

> "The Treaty of 1955 dined the line of the frontier by reference to a line resulting from international instruments annexed to the 1955 Treaty." (CR 93/21, p. 58.)

Now is this really what Article 3 says? What Professor Higgins would have us do is to replace the phrase "sont celles qui résultent" by "sont des lignes qui résultent". And this distorts completely the meaning of the language used. Then what does Professor Cot say? Well, he is a bit more cunning. He is quite content with the Libyan demonstration that the phrase "celles qui résultent" refers to the frontiers already mentioned. But note what he then says, and I hope I have correctly translated his remarks into English:

> "The more it is emphasized that it is indeed a question of frontiers, that is to say of lines separating the territories of the two Parties and not of an undetermined zone, the more the text gains in precision." (CR 93/21, p. 74.)

The Court will note the casual way in which a highly controversial definition of the term "frontiers" is introduced into this sentence. Again, the term "lines" is equated with "frontiers". But a line is not a frontier, certainly not necessarily a frontier. The Additional Declaration of 1899 certainly fixed a line in Article 3; but even Chad admits it was not a frontier line at that time. Professor Cot would therefore have us make the same emendation of the text as Professor Higgins. He might indeed go further and ask us to remove from the text altogether the phrase "sont celles qui". And this is how Chad seeks to distort the plain meaning of Article 3.

Another feature of Chad's argument on which I feel bound to comment is Professor Cot's insistence that what the 1955 Treaty envisaged was the delimitation of a *single* frontier, and that Article 3 and Annex I were concerned only with "une frontière unique". I do not wish to be unfair to

our learned opponents, but once again, we do not seem to have been reading the same documents. In the first place, I look at Article 3 of the 1955 Treaty and the very first words I see are "Les deux hautes Parties Contractantes reconnaissent que *les frontières* . . .". Note the use of the plural. Article 3 itself acknowledges that more than one single boundary is involved. In the second place, does Chad seek to deny that the actual boundary negotiations undertaken by the two parties in 1955 bore exclusively upon the identification of three points thought which the boundary line should run in the sector of the Libyan/Algerian boundary between Ghat and Toummo? If he does do so, then where in the *travaux préparatoires* are there any references to the delimitation of the boundary between Ghat and Toummo? If she does do so, then where in the *travaux préparatoires* are there any references to the delimitation of the boundary in the sector between Toummo and the Sudanese border? The notion that Article 3 of the 1955 Treaty, read with Annex I, was constitutive of the boundary between the French and Libyan territory throughout its entire length is quite inconsistent with the fact that the boundary negotiations in 1955 concentrated only on the sector between Ghat and Toummo, and were followed by separate boundary negotiations in 1956 as regards the sector between Ghadamès and Ghat. The alleged *single* frontier in 1955 consisted of the following distinct sectors":

(1) form the Mediterranean to Gadamès;

(2) from Ghadamès to Ghat;

(3) from Ghat to Toummo;

(4) from Toummo to the Sudanese border.

Not only were these distinct sectors in 1955/1956; but the alleged conventional basis for the delimitation of each of these sectors differed one from the other, as the Court will be well aware. Prior to 1955, the delimitation of the boundary in sectors (2) and (3), which I have mentioned, resulted form the Franco-Italian Arrangement of 12 September 1919, but we know that this was modified or clarified (depending on one's point of view) by the Exchange of Letters of 26 December 1956, as regards sector (2), and by Annex I to the 1955 Treaty as regards sector (3). So the mirage of a *single* frontier throughout its entire length delimited by the combined effect of Article 3 and Annex I remains a mirage; as soon as one looks at it closely, it disappears and

dissolves into the different sectors with which the Court will already be familiar. In this context, Mr. President, I should perhaps indicate now that Libya will have more to say at a later stage about the complete absence of any conventional basis, even if one accepted Chad's first thesis, for the sector joining Toummo to the Tropic of Cancer.

Now, I cannot conclude my analysis of the arguments presented by Chad on the interpretation of Article 3 and Annex I without commenting on the silences of Chad's Counsel on a number of highly significant issues. For example, there is the whole question of Annex I. Professor Cot chides me for having translated the phrase "tels qu'ils sont définis" by "as listed in Annex I". I can only plead in my defence that, on this specific pint, I did in fact utilise the translation provided by the Registry of the Court. What is perhaps more significant in Professor Cot's treatment of Annex I is his continued insistence that this is a "normative provision"defining a corpus of instruments describing completely and precisely the frontier between the two Parties. I am perplexed by this. The Court will recall that the only reference one can find in the *travaux* to the Annex I list is the lapidary statement to be founding the Aide-Memoire handed over to the Libyan Prime Minister by Ambassador Dejean on 8 August:

> "Nous avons admis, dans l'Artilce 3 du traité . . . que les frontières par les actes internationaux en vigueur. Nous sommes d'accord sur la liste de ces actes." (Ann. 130 to the CR.)

Of course, in my earlier statement of 15 June, I did point out the inaccuracy of the first sentence of this passage. But the point I wish to make now is that, in this Aide-Memoire, the French negotiators are quite content to refer simply to the agreement reached on the "list" of these acts. There is nothing here to support the suggestion that the list of international acts in Annex I constitutes by itself a "normative provision". There may be other "normative provisions" in Annex I., but not the list by itself, which, Libya continues to insist, is essentially designed to identify the international acts to which the necessary cross-reference is made in Article 3 of the Treaty itself. As far as the recognition of the frontier is concerned, it is Article 3, admittedly read in conjunction with Annex I, which is the "normative provision".

But there is one additional feature of the list in Annex I on which our opponents neglect to comment; and that is its mysterious genesis. Libya has carefully analyzed all the *travaux* that have

been presented to the Court and has concluded that the list in Annex I must have been presented for inclusion in Annex I sometime between 28 July and 8 August, since we know that Ambassador Dejean reported to Paris on 28 July that the boundary question had been settled to France's satisfaction. Our opponents have not sought to contest this conclusion. However, they still seek to rely heavily on the alleged normative effect of the list in Annex I, even though they can produce no evidence on the origins of that list and when it came to be incorporated in the text.

One final pint, Mr. President, on Annex I. Professor Cot seeks to draw from the reference to "demarcation" in that Annex the conclusion that the delimitation of Libya's boundaries throughout their entire length had already been settled in the body of the treaty. Let us just look at this a little bit more closely. Annex I does indeed include a paragraph on demarcation in the following terms and here I give an English translation:

> "The French Government is ready to appoint experts who could form part of a mixed Franco-Libyan Commission entrusted with the task of demarcating the boundary, wherever that work has not yet been done and where either Government may consider it to be necessary."

This paragraph immediately follows the paragraph in Annex I which defined the three pints through which the boundary from Ghat to Toummo runs. It is clear that the immediate necessity for demarcation arose precisely in the sector running from Ghat to Toummo where the course of the boundary line already delimited by the Franco-Italian Arrangement of 12 September 1919 had been rectified. This is confirmed by the entry in the Libyan *travaux* for 26 July 1955, where the "formation of a Franco-Libyan committee to demarcate the frontier" is lined to the "interpretative letter" relating to the frontiers (ML, Exhibit 73). It is in any event somewhat ironic that if, as Chad contends, the 1955 Treaty had the effect of delimiting Libya's southern boundary, *France* did not request the demarcation of that sector pursuant to the procedure set out in Annex I. Libya had no thought of making such a request since, in Libya's view, her southern boundary had not been delimited by the 1955 Treaty or indeed by any of the instruments listed in Annex I.

There is another major gap in the analysis which our opponents have made of the context of the 1955 Treaty. They have sought to analyze in some detail the relevance of Articles 4 and 5 of the Treaty and of certain provisions of the Convention de bon voisinage and the convention particulière.

I have already dealt with theses pints in my first statement and do not need to revert to them. But our opponents are strangely reticent about the Exchange of Letters of 26 December 1956. Professor Cot does of course not seek to deny that this is part of the context of the 1955 Treaty. But all he says about it is that this agreement renders more precise the delimitation effected by the 1955 Treaty in the region of Edjelé; that its preamble refers to the Franco-Italian arrangement of 12 September 1919, considered as being in force; and that at no pint in the text is any mention made of another sector of the boundary between the Parties which could be the subject of a subsequent delimitation. Now, Mr. President, Members of the Court, does this explain the true significance of the 1956 Exchange of Letters as part of the context of the 1955 Treaty? Libya would say not at all. The Court will not wish me to repeat what I said in my first statement on 15 June. What is truly significant about the 1956 Exchange of Letters is that it totally destroys the Chad myth that the 1955 Treaty finally achieved or confirmed the delimitation of the entire length of the boundary dividing Libya from French possessions. If that Treaty truly did what Chad claims for it, why was it necessary for France to insist in 1956 upon a further rectification of the boundary between Libya and Algeria as a precondition for French ratification of the 1955 Treaty? There is, in Libya's submission, no way in which the 1956 Exchange of Letters can be reconciled with the Chad view of the matter.

There is one further important observation which I must make. Professor Cot professes puzzlement about the passage in Libya's Memorial (para. 5.470) which states that the words in Article 3 "reconnaissent . . . que les frontières . . . sont celles qui résultent des actes internationaux en vigueur" were a reflection of France's confidence in its thesis that a conventional boundary already existed in 1951. And he suggests (a passage which I profess not wholly to understand) that this means that the text of the treaty embodied the French thesis but should be considered as not having been written because it did not embody the Libyan thesis (CR 93/22, p. 24).

Mr. President, Members of the Court, I amy have misunderstood this passage and I would not wish to suggest that our opponents are deliberately seeking to obscure a very clear and simple passage of Libya's Memorial. But, with all respect, Professor Cot seems entirely to have missed the point. What Libya is saying is that *France* was quite content with the text of Article 3 because the

French negotiators purported to believe that a southern boundary of Libya did result from a combination of the texts listed in Annex I. They did not even begin to consider that possibility that a southern boundary of Libya did not or would not result from any of these instruments because of their content of their lack of opposability to Libya. In other words, they did not even contemplate that their thesis might be misguided. Libya, on the other hand, was content with the text of Article 3 and Annex I because Libya did not believe that the language used was such as to determine a boundary in any sector where a boundary had not previously been determined. Libya's firm conviction even after 1955 was that its southern boundary remained to be delimited.

I turn now to another point arising on the interpretation of Article 3 to which our opponents have directed little attention. That is the meaning to be attributed to the phrase "actes internationaux en viguer à la date de la constitution du Royume-Uni de Libye". Our opponents construe this phrase as establishing the intent of the Parties to regard the instruments listed in Annex I as being in force on 24 December 1951, irrespective of whether, as a matter of treaty law, they *could* have been regarded as being in force on that date. But surely, Members of the Court, this cannot be enough. The temporal condition specified in Article 3 existed independently of the Annex I listed and has to be satisfied. The Annex I list simply identifies the intentional acts to which reference is made in Article 3 without certifying as to their being in force on 24 December 1951. That is a condition, set out in Article 3 itself, which remains to be satisfied. Libya is of course aware of Chad's argument that Article 44 of the Italian Peace Treaty did not require the notification of treaties affecting territories to which Italy renounced title by that Treaty. But, even if Chad were right on this point, it would not necessarily solve the problem. As I pointed out in my earlier statement of 15 June, the Franco-Italian Accord of 1902 would have terminated in any event in 1947. Italy, having renounced title to Libya, was no longer in a position to fulfil such obligations as it had undertaken towards France in 1902. As between the parties, therefore, the 1902 Accord had expired: its raison d'ère had disappeared. This was simply an example which I gave without considering whether any of the other listed acts remained in force on 24 December 1951.

There are a few additional miscellaneous points to which I should now direct attention. The first concerns the Emir Idris. Various of Chad's counsel (including in particular Professor Franck)

have sought to argue that significance should be attached to the fact that, in 1948-1949, the Emir Idris protested vociferously against the Egyptian territorial claim but said nothing about French claims. This is just to remind the Court, and indeed our opponents, that, at the relevant time, the Emir Idris was simply Emir of Cyrenaica and therefore not authorized to speak or act on behalf of Libya as a whole.

The second miscellaneous point concerns the Libyan submission that Article 3 of the 1955 Treaty operates to exclude colonial *effectivités* in the determination of any boundary pursuant to its terms. Libya continues to believe that this exclusion is a natural consequence of the wording of Article 3 which refers to the boundaries recognized by the parties as being those "which result from the international acts in force on the date of the constitution of the United Kingdom of Libya". Chad contest this interpretation. In this context, Mr. President, I would simply draw the attention of the Court to the Libyan *travaux* of the 1955 Treaty. Exhibit 73 to the Memorial of Libya contains an exchange between the Libyan Prime Minister and Ambassador Dejean at the morning meeting held on 28 August 1955. In that exchange the Libyan Prime Minister is recorded as saying that the frontier question (and by this he clearly meant that Libyan/Algerian frontier) "was not free from difficulty since the Italians had occupied may centres behind the existing frontier". Ambassador Dejean is recorded as having said in reply that

> "it had actually been done but in an illegal manner and that Italy had exploited France's weakness during the last war ensconce itself in its lands and that it had crossed over the borders which had been agreed upon under the Agreement of 1919 which were still valid at the present time".

Here there is cogent and compelling evidence of the French position that the boundaries recognized under Article 3 must be conventional boundaries deriving from the specified international acts, and not boundaries deriving from *effectivités* alone. Moreover, it is contemporaneous evidence demonstrating France's anxiety about Italian *effectivités*, not a simply theoretical construct dreamt up nearly 40 years on.

Mr. President, the third miscellaneous point concerns the so-called "Aouzou incident" or "Moya" incident of 1955. Professor Cassese, in his second pleading on 1 July made more of this incident, presenting it as a clear acknowledgement by Libya and France's sovereignty over the

so-called "Aouzou strip". It was of course nothing of the kind. The facts of this incident, stripped of the tendentious overtones which Professor Cassese seeks to put on them, are recounted in paragraphs 1.19 and 3.34 to 3.56 of the Counter-Memorial of Libya. Libya would respectfully ask the Members of the Court to compare Professor Cassese's colourful version with the more sober and restrained account of the same incident given in the Counter-Memorial of Libya. It would seem that the facts of this incident are obscure and contested. Libya hotly denies the inferences which Chad seeks to draw form its version of the facts. There is a supposed conversation between Mr. Dumarçay and the Libyan Prime Minister, but, although the Libyan Prime Minister is alleged to have given a similar assurance to the British Ambassador, there is no confirmation of this in the British archives. And from all this Professor Cassese deduces Libyan acknowledgement that the so-called "Aouzou strip" — not even known at that time by the name — belongs to France. No attempt is even made to discuss, far less respond to, the more measured Libyan account of this incident in its Counter-Memorial. Mr. President, this bears some resemblance to a dialogue of the deaf; it is hardly serious.

I turn now to the first pleading of Professor Franck. In this pleading, our learned opponents seek to explain away French conduct at the United Nations in 1949-1950 and the terms of General Assembly resolution 392 (v). The Court will of course have noted that our opponents have not referred to the proposal for boundary revision presented by France to the Four Power Commission in 1948, the proposal which, as I demonstrated to the Court on 15 June, would, had it not encountered resistance from other of the Four Powers, have amputated Libyan territory in the west and the south to the benefit of Algeria, French West Africa and French Equatorial Africa. now, one of the points persistently made by Professor Franck and, indeed, other of Chad's counsel is that French representatives clearly and unequivocally presented to the United Nations General Assembly the French position on Libya's southern boundary, and that this position was not contradicted. I give a few examples of this line of argument:

1. Professor Franck on 28 June:
"the [General] Assembly had presented to it, by France, repeatedly, a clear and uncontroversial definition of Libya's southern frontier, a definition in which the United Nations members acquiesced" (CR 93/22, p. 46).

2. Professor Franck in the same address on 28 June, referring to the statement by Mr. Naudy to the *Ad Hoc* Political Committee on 13 December 1950:

> "With great clarity, he spelled out the agreements of the colonial era which were relevant to Libya's southern frontier, listing the Franco-Italian Agreement of 1 November 1902 which confirmed the Additional Statement of 21 March 1899 to the Franco-British Convention of 14 June 1898, complete with the supplementary Franco-British Convention of 8 September 1919." (CR 93/22, p. 60.)

Mr. President, I showed this extract from Mr. Naudy's statement on the screen a few minutes ago. How this can be represented as a clear and uncontroversial definition of Libya's southern frontier defies belief. To refer the bemused delegates to the *Ad Hoc* Political Committee to a Franco-British Declaration of 1899, to a Franco-Italian Accord of 1902 and to a Franco-British Convention of 1919 as defining Libya's southern boundary in 1950, without any further explanation, is rather like expecting a group of nine-year-olds to respond to a claim asserting the authenticity of the Hitler diaries. In this particular instance, at least, silence should not indicate acquiescence — it could only indicate utter bewilderment. And this is quite apart form the fact that the statement contains several notable errors to which I draw attention earlier.

There is one additional point I would make on Professor Franck's presentation of 28 June concerning the period of the United Nations involvement in 1949-1950.

Professor Franck sought to make fun of the United Nations map No. 241, the "Sketch-Map of Libya's Frontiers" attached to the Secretariat Study of January 1950, referring to it as the "phantom map" and seeking to trace its paternity (CR 93/22, pp. 48-51). Indeed he characterizes it as "son of the Four-Power map, grandson of the British Ordnance map and great-grandson of Mussolini's map". Well, let us carry out the necessary blood tests. here, on the screen is the so-called : Four-Power map" — the amp annexed to the Report of the Four-Power Commission. And here you will see is United Nations map No. 241. Now we revert to the Four-Power Commission map where the line shown on that map has now been emphasized. And what we have to do is to compare the line on that map w.th the line on United Nations map No. 241. The Court will see the result. I am sorry to say that this casts very considerable doubt on the paternity of United Nations map No. 241. It looks as if we may have to look for another father.

Then, Mr. President, we have resolution 392 (V). Professor Franck affects to believe that,

following M. Naudy's statement to the *Ad Hoc* Political Commission and the lack of reaction to it, France was able to vote in favour of resolution 392 (V). According to him, French conduct in 1950 shows "that it would not have voted for a resolution which placed in doubt a boundary with it had so clearly and publicly defined" (CR 93/22, p. 60).

Mr. President, might I suggest politely that this is really no more than an *ex post facto* rationalization? I am sorry to have to repeat myself but the true explanation must surely be that France maintained blindly and stubbornly that the instruments cited by M. Naudy *did* result in a southern boundary for Libya. There must be at least a large measure of doubt as to whether that position was, or could have been, based on a genuine belief. The evidence certainly shows that some French officials retained vestigial doubts about the public French position. But it is that French position, persisted in with so much commitment, that Libya maintains is, and always was, profoundly mistaken. It is only in the *exposé des motifs* of 1935 that we see the truth conceded.

Mr. President, Members of the Court, I do not think I can conclude without making reference to what I must characterize as the extraordinary outburst we heard from Professor Higgins at the conclusion of her argument to the Court on 30 June. She enquired rhetorically: why did Libya conclude a treaty on its boundaries with a State that, on its own argument, could never have secured international title to Chad? What was the purpose of the 1955 treaty? And she goes on to comment:

> "We have now reached the point where we have a treaty that not only does not do what it clearly says, but refers without point to annexed instruments of reference — and it is concluded with a party said to have no legal rights over the subject-matter." (CR 93/24, p. 42.)

Why I characterize this as an extraordinary outburst is because it seems to reveal that Professor Higgins has had some difficulty in understanding Libya's written pleadings. I will just remind her briefly of the following points:

1. The 1955 Treaty was a treaty of friendship designed primarily to secure the evacuation of French troops from the Fezzan.

2. Libya did not want the 1955 Treaty to deal with boundaries, but, on French insistence, agreed to the inclusion in the Treaty of Article 3 and Annex I.

3. What Article 3 clearly says is that both Libya and France recognize that the boundaries which separate their respective territories are the boundaries which result form certain international acts in force on the date of Libya's independence, as listed in Annex I.

4. Some of these international acts had fixed boundaries, others had not; some had been concluded between France and Libya's predecessor or predecessors in title, others had been concluded between France and third States.

Now it is of course a well-known trick of advocacy to distort the case of one's opponent in order the more easily to refute it. The problem with Professor Higgins' outburst is that it does not even begin to describe Libya's case. She is rather inviting us to enter one of these "crazy houses" to be found in an amusement park where she is seeking to persuade us that the grotesque figure to be seen in a distorting mirror is Libya's case. Libya can only deplore such excess of language, and will endeavour not to emulate it.

I would simply remind the Court, and indeed our distinguished opponents, that Libya believes that Article 3 does exactly what it says it does. It operates as a joint *recognition* by both Parties of those boundaries already fixed by international agreements between States competent to fix such boundaries. This was clearly the case with the boundary between Libya and Tunisia fixed by the 1910 Convention between France and the Ottoman Empire, and it was also the case with the boundary between Libya and Algeria fixed by the Franco-Italian Arrangement of 12 September 1919. But it was not, repeat not, the case with Libya's southern boundary east of Toummo. What Libya and France were doing in Article 3 of the 1955 Treaty was precisely to apply in advance, in their mutual relations, the terms of the Cairo Declaration to be adopted nine years later in 1964. That is why Libya never had any problems with the Cairo Declaration; she had already accepted the principles which it embodied in the 1955 Treaty with France.

Mr. President, Members of the Court, that concludes my presentation. I am very grateful to you for your attention and I would like you now to call upon Mr. Sohier.

The PRESIDENT: Thank you very much, Sir Ian. Mr. Sohier.

Mr.SOHIER: Thank you Mr. President, Members of the Court. During Professor Pellet's

second intervention on Tuesday 29 June, attention was drawn to a major change in emphasis in Chad's case. This concerned Chad's second thesis, based on the 1899 Declaration and the 1900-1902 Accords.

No doubt Chad's second thesis is acrobatic in its complexity; and changes in such a complex scenario are not always easy to detect. But, fortunately, Professor Pellet specifically noted this change in Chad's case; and, of course, when such an important change occurs this late in the case, it is of special interest. The change, according to Professor Pellet, is that Chad has essentially dropped the French argument that the 1902 Accord made the south-east line of Article 3 of the 1899 Declaration opposable to Italy and, thus the contention that the Article 3 line limited the French zone of expansion vis-à-vis Italy.

Chad's Change of Position

At the core of Chad's conventional boundary or second thesis is the 1902 Accord, or more correctly, the 1900-1902 Franco-Italian Accords. The 1902 Accord was what the French Government called the "texte de base" of its position as to Libya's southern frontier. The French Government used just these words — "texte de base" — when, in May 1955, as preparations were being made for the second phase of negotiations of the 1955 Treaty, M. de la Chevalerie of the French Embassy paid a call on the British Foreign Office, leaving an *aide-mémoire*, in an attempt to win Great Britain's support for the French position in the negotiations. The extensive discussion devoted to this Accord by Professor Pellet last week gives the strong impression that the Accords remain very much the "texte de base" of Chad's case.

Before going into these Accords, let me first bring to the Court's attention the fact that Chad would define tem second thesis, according to Professor Pellet, on the assumption that the 1955 Treaty did not exist. This cannot be accepted. The Treaty is in effect and binding between Libya and Chad. Chad cannot in such a facile way attempt to escape from the conditions of Article 3 of the Treaty under which the boundaries recognized there by the parties were those boundaries that resulted from "actes internationaux en vigueur" on the critical date, that is the date of Libya's independence. These conditions must be applied to Chad's second theory, not just to its first theory.

This attempt to sweep tem 1955 Treaty out the door comports with Chad's claim that its case relies on the 1955 Treaty.

Chad's position based on tem 1900-1902 Accords was modelled on the French position Rouard de Card. It was further developed by the French Government and later embellished by Chad. Up until this recent change in Chad's case, these Accords were said to establish the following essential propositions of Chad's case:

— That as a result of these Accords a division of spheres of influence was agreed between Italy, Great Britain and France over Tripolitania and the territories adjoining it;

— that, as a consequence, Italy virtually became a party to the 1899 Anglo-French Declaration;

— that Italy specifically recognized and agreed to a French sphere of influence outside of the wavy, dashed line encircling Tripolitania on the *Livre jaune* map;

— that this line was also accepted by Italy as delimiting the southern boundary of Tripolitania between Toummo and the Tropic of Cancer;

— that, at the same time, Italy accepted, as well, the east-south-east line appearing on the *Livre jaune* map as faithfully representing the Article 3 line of the 1899 Declaration;

— that this line, being so close to the Article 3 line as " interpreted" by the 1919 Anglo-French Convention, was in effect also accepted by Italy and, hence, became opposable to it;

— that, as a result, Italy had no right to object to or protest the 1919 Convention; and last, but not least,

— that, in the 1902 Accord, Italy renounced any inheritance of Ottoman territorial rights, titles or claims over the Tripolitanian hinterland, and could no longer base a territorial claim on any inherited Ottoman rights.

One is stunned by the sheer scope and boldness of these assertions said to emanate from such modest Accords. For example, that Italy in the 1902 Accord could be deemed to have accepted an alleged boundary first established 17 years later by Great Britain and France: Or that in 1902 Italy renounced Ottoman rights that were reasserted in the borderlands by direct Ottoman administration and control starting some six years afterward!

Libya's written pleadings demonstrated the may defects in Chad's second thesis based in large

part on the 1900-1902 Accords, and these defects were again dealt with briefly during the first phase of the oral proceedings. Certain of these defects apparently have come to appear particularly threatening to Chad's case as that case has developed.

For example, what if the Court should decide, contrary to Libya's position, that in the 1900-1902 Accords Italy accepted the Article 3 line of the 1899 Declaration, but then should decide, in agreement with Libya, that this line was intended to be a south-east line, as wrongly shown on the *Libre jaune* map? Such a line now appears on the screen. The only consolation for Chad, if such a boundary were fixed by the Court, would be that Aouzou happens to lie to the south of such a line.

So it may have occurred to Chad that the French theory that Italy accepted the Article 3 line in the 1902 Accord was risky. There was also the embarrassment to face that Great Britain and France differed fundamentally both as to the direction and the nature of the 1899 line — not to speak of the fact that Italy vigorously and continually protested both the claimed direction and nature of the line as modified in 1919 right up to the end of 1934.

Then there was the problem of the Ottoman rights and titles inherited by Italy under the Treaty of Ouchy in 1912. At firs, Chad's pleadings treated this aspect of Libya's case as being not too serious, relying on the uninformed and biased French military accounts that depicted the Ottoman present in the borderlands as ephemeral ("éphémère") and, with a Gallic touch, "platonique" (platonic). Libya's pleadings have proved otherwise, and the extensive attention given to the matter by Professor Shaw suggest that Chad now takes the basis of the Ottoman claim far more seriously. So this, too, posed a new problem to try to get around. Fro the Court might have been tempted to consider Chad's far-fetched renunciation argument based on the 1902 Accord if the Ottoman claims seemed trivial; but certainly not when it became apparent that the Ottoman claims were indeed substantial.

Libya's pleadings have also identified a serious legal defect in Chad's conventional boundary theory based on the 1900-1902 Accords. This is the lack of standing of either Italy or France in 1900-1902 to settle the status of territories or territorial boundaries in these regions where they were not sovereign.

And Libya has pointed out that complete absence of any legal basis for the segment of the

boundary claimed by Chad lying on a line between Toummo and the Tropic of Cancer.

Finally, Chad may have realized that it had to face the fact that the "texte de base" of Chad's conventional boundary case totally vanishes for the reason that the 1900-1902 Accords were not *en vigueur* on the critical date in 1951, as required by Article 3 of the 1955 Treaty.

So a shift has been made in Chad's case in an attempt to deal with these problems. Instead of emphasizing Italy's supposed acceptance in 1902 of the south-east line of Article 3 of the 1899 Declaration, Chad's case has shifted to establishing that, in the 1900-1902 Accords, Italy recognized an *actual existing Tripolitanian boundary*, as shown on the *Livre jaune* map — the wavy, dashed line — and a French sphere of influence up to that line.

Such a shift would mean that the Article 3 south-east line was of relevance only to Great Britain, for the French sphere supposedly recognized by Italy went far beyond it, as shown on the screen. Hence, Chad would argue, Italy had no right to object to the 1919 modification of this line. it just did not concern Italy. And the territorial rights inherited from the Ottoman Empire under the Treaty of Ouchy, vis-à-vis France at least, were subject to the alleged agreement by Italy in 1902 as to Tripolitania's boundary and as to the French sphere of influent up to that boundary. Such an agreement would, it is contended, eliminate Italy's right to claim any Tripolitanian hinterland beyond that boundary.

Moreover, under this shift, the Tripolitanian boundary would not have been a boundary in 1902, but would be an already recognized international boundary claimed to appear on maps at the time.

The fact that the 1902 Accord was not *en vigueur* in 1951 would also not really matter any more, for Italy's territorial rights east of Toummo could not be based on any Ottoman rights, titles or claims, but only on Article 13 of the 1915 Treaty of London. Chad could thus argue that the 1919 Anglo-French line, combined with alleged French *effectivité*, provided a far stronger basis of title than any rights or titles inherited by Libya from Italy.

So the key to Chad's revision second theory was to firm up the argument that the wavy, dashed line on the *Livre jaune* map referred to in the 1902 Accord was indeed a an international boundary. Professor Pellet informed the Court that Chad has discovered what appears to Chad to be

the basis for establishing that this line was such a boundary (CR 93/23, pp. 29-32).

This discovery is a map that first appeared in this case in Chad's Map Atlas annexed to its Counter-Memorial. This is the German Justus Perthes map of 1892, one of the two maps that were consulted by Lord Salisbury and Mr. Cambon during the 1899 negotiations. These maps were referred to in the first round by Libya.

1892 Justus Perthes Map: the Undefined Tripolitanian Frontier

Libya reproduced this German map in its Reply and, according to Chad, modified a part of the map in such a way as to obscure the that that the line encircling Tripolitania on the map was identified as a colonial boundary.

It is, or course, a serious accusation, as Mr. Maghur has pointed out, to suggest that Libya tampered with this map to obscure a material fact in this case.

I now invite the Court to examine the details of Chad's accusation. On the screen is this map. Professor Pellet suggests that, on the reproduced of this map in Libya's Reply, the wavy, dashed line — which, the Court can see may barely be made out, if at all — was enhanced or drawn over by a line placed on the map by Libya.

Professor Pellet is quite right. The line placed on the map by Libya is being shown on the screen. Libya did superimpose such a line on the map. This was done so that the wavy, dashed line on the German map would be visible.

Professor Pellet claimed last week that, by so emphasizing or drawing over the wavy, dashed line, Libya modified it in such a way that the line no longer corresponded with any line in the map's legend. whereas the line, as shown on the original map, before being drawn over by Libya, corresponded to a line in the legend defined in German as indicating "Turkish colonial frontiers".

This will now be demonstrated on the screen. here is the German map's legend. On it appears a continuous line composed of dashes and dots identified as *Kolonialgrenzen* or "colonial frontiers". Another part of the legend, by the use of coloured boxes, shows the colours that correspond to different States. The orange colour corresponds to Turkish areas, that is areas of the Ottoman Empire.

Referring to the map again, it will be seen that the wavy, sashed line is indeed a line composed of dashes and dots, as is the line identified in the legend to indicate colonial frontiers. This line is accompanied on the inside by a much thicker, orange line, thus identifying Tripolitania, which lies inside the line, as being Ottoman. The line is indicated as a solid line there on the right-hand side of the map and then the line becomes not a solid line, but a broken line.

thus it is apparent that the wavy, dashed line encircling Tripolitania on the Justus Perthes map does not correspond to the line in the legend identified as indicating colonial frontiers. One is a broken line; the other is a continuous line. And this difference is reflected a common cartographic practice of long standing, one which in fact prevails today. Defined boundaries are indicated by continuous lines; undefined frontiers, by broken lines. I think the Court can clearly see that the line running in this direction there on the map is a broken line and that this is a continuous line here on the map and hence identified in the legend of the map as a colonial frontier.

I invite the Court to examine the part of this line in the region of Toummo. Toummo is right here on the map. The line comes down here and runs up north. It is a broken line throughout the region indicating that it was not a defied or certain frontier.

So Libya's enhancing of this map, so as to make the wavy, dashed line encircling Tripolitania visible, in no way affected the meaning or interpretation of this line. For that line is not shown as a boundary on the map — only as an uncertain, undefined boundary, what Libya has called a notional frontier. This term — notional frontier — provoked Professor Pellet to suggest that Libya's counsel were faithful disciples of the French playwright Giraudoux, who described the law as the best training ground for the imagination. My recommended reading for distinguished counsel of Chad is somewhat different. I would suggest Gustave Flaubert, who is credited with having said: "God is in the details"("le bon Dieu est dans les détails").

Livre jaune Map

But the matter does not end there, for Chad's quest for a Tripolitanian boundary dates back to Chad's case of the *Livre jaune* map — neither annexed nor referred to in the 1899 Declaration, I must again remind the Court — , Chad's Memorial displayed, not a colour reproduced of the original

map — so easily found in Paris — but a black and white "extract" of a portion of the map. This is a reproduction of the map that Libya found in the Library of the *Science Po* in Paris. This map does not appear in this coloured form in the Map Atlas of Chad. I mentioned that in Chad's Memorial the map I just displayed was not included but rather an extract — a black and white extract — that contained the very sort of modification of the *Livre jaune* map, so as to alter its meaning, that Professor Pellet accused Libya of doing in respect to that Justus Perthes map.

In both its Counter-Memorial and its Reply, Libya demonstrated the misrepresentation contained in the extract of the *Livre jaune* map appearing at page 162 of Chad's Memorial. Let me make the same demonstration on the screen. You have in front of you the colour reproduction of the original *Livre jaune* map. It is necessary to have a colour reproduction to understand and apply the legend. The point of interest is the wavy, dashed line encircling Tripolitania. The question is how is that line defined in the map's legend?

The legend depicts lines indicating boundaries of French possessions pursuant to prior conventions. These are shown by a grey symbol, and these sorts of boundaries can be found on the map as the arrows on the map show. The wavy, dashed line is clearly not such a boundary as the arrow at the top indicates. A red symbol on the map's legend shows the French boundaries pursuant to the 1899 Declaration. Such boundaries can also be located on the map. Once again, the wavy, dashed line does not match these boundaries.

In fact, the wavy, dashed line on the *Livre jaune* map is not identified in the legend at all. no line corresponding to the wavy, dashed line appears in the legend. Thus, on no account, could this map be read as representing the wavy, dashed line to be a boundary. For this reason, Libya's maps have labelled this line as a "notional frontier", a term that disturbed Professor Pellet, apparently. So perhaps a happier term might be an uncertain or undefined frontier.

Now, I ask the Court to take a look at the so-called "extract" of this map that appeared in Chad's Memorial. The wavy, dashed line around Tripolitania is identified in this map's legend as a boundary, established under prior conventions. Aside from being an obvious distortion of the *Livre jaune* map, of which it purport to be an "extract" — for as just shown the *Livre jaune* map does not represent this line as a boundary — ,the identification of this line as a conventional boundary is

false. There were no prior conventions establishing a Tripolitanian boundary in 1899 or in 1902. Only in 1910 was the first of such boundaries established by treaty; the boundary between Tripolitania and Tunisia as far as a point just south of Ghadamès.

With Chad's Counter-Memorial was furnished a Map Atlas that contained 162 maps. And last week the Court had the benefit of hearing Professor Cot on the subject of this Map Atlas. Not one of the maps in the Atlas was a colour reproduction of the *Livre jaune* map. Chad merely furnished extracts or partial black and white reproductions, on none of which was it possible clearly to determine from the legend that the wavy, dashed line was not identified on the map as a boundary.

In Chad's Reply, there is no explanation given as to why Chad has furnished maps that misrepresent or obscure a correct reading of the *Livre jaune* map and Chad agave no explanation during these oral proceedings even during Professor Cot's extensive discussion of maps, and in spite of the fact that Libya has repeatedly raised the point.

So it must be concluded that the supposedly recent cartographic discovery made by Chad is no discovery at all. No published map available in 1902 showed any conventional Tripolitanian boundary. This is not surprising: in 1902 there were no such conventions establishing such a boundary.

1906 Italian Ministry of Foreign Affairs Map

Mr. President, in 1906. the Italian Minister for Foreign Affairs issued a map, which is now on the screen and which the Court will recall from Professor Condorelli's presentation. This official Italian map, issued only four years after the 1902 Accord, shows no line of any kind encircling Tripolitania. It depicts the line of Article 3 of the 1899 Declaration as a strict south-east line, not an eat-south line as shown on the *Livre jaune* map. And it contains a large area south of Tripolitania shaded white, which is described on the map as territory claimed by both France and Turkey, that is the Ottoman Empire.

This 1906 map by itself refutes Chad's interpretation of the meaning and effect of the 1900 and 1902 Accords.

France's subsequent conduct

France's subsequent conduct also refutes Chad's interpretation of these Accords. There has been placed on the screen the area to the west of Tripolitania in he vicinity of Djanet where a status quo agreement was reached between France and the Ottoman Empire in 1906; and subsequently a line, established by decree issued by the Governor-General of Algeria in 1907, limiting the advance eastward toward Tripolitania of French forces. This data was discussed in the first round.

This status quo agreement and line of limitation are incompatible with the claim of Chad that in 1902 the wavy, dashed line sown on the *Livre jaune* map was a recognized boundary. Had there been such a boundary, the status quo agreement and the line of limitation would have been unnecessary or at least a basis for discussion. The evidence produced in this case concerning Djanet status quo agreement contains no reference to any kind to a Tripolitanian boundary.

The absence of such a boundary was once more demonstrated in 1910, when the Tripolitania-Tunisia boundary was delimited by Treaty and subsequently demarcated. The text of the 1910 Treaty contains no suggestion that it was replacing or modifying an existing Tripolitanian boundary. It clearly was delimiting a boundary for the first time. This is seen, for example, from the Treaty's title — "Convention *fixant* la frontière" between Tunisia and Libya. There is no suggestion of rectifying an existing boundary. And Article 3 speaks of "La dernier élément de la frontière, a part of the boundary that continued on to a point 15 kilometres further south of Ghadamès. There is no mention of its linked up with another boundary continuing on to the south. The sector at Ghadamès was described in the Treaty as the last element of the boundary line.

That this was the end of the boundary was confirmed in the subsequent efforts to the French Government to convince the Ottoman Empire to agree to the appointment of a joint delimitation commission to complete the work begun in 1910 in order to fix Libya's boundary beyond Ghadamès.

The position of the French Government was set out in a statement of the Ministry of Colonies, dated 13 August 1911, published in *Le Temps* (ML., para. 4.139). It was made just after news of the Ottoman presence at Aïn Galakka had been reported to Paris. In this statement, the French Minister refers to the provisional status of Tibesti and Borkou. He mentions the forthcoming meeting in Tripoli of a joint delimitation commission to delimit the boundary between Tripolitania and what he

calls the French Sahara. It is clear from his statement and an analysis of it in the *Bulletin colonial de l'Afrique française* (ML, Exhibit 32), that the task of the joint commission was to complete the boundary delimitation begun in 1910 so as to fix the rest of the Tripolitanian boundary from Ghadamès on to the Anglo-Egyptian Sudan frontier.

There was no Tripolitanian boundary of any kind until the 1910 Treaty delimiting the Tripolitania-Tunisia boundary. Chad's attempts to establish that there was the wavy, dashed line appearing on the *Livre jaune* map fail completely. In 1902, no map in evidence in this case or known to Libya showed the wavy, dashed line encircling Tripolitania on the *Livre jaune* map to be a boundary.

The consequence of this failure of Chad directly concern the boundary claimed by Chad in its Submissions. There is no legal basis whatsoever to support the western segment of Chad's claimed line, that is the segment between the intersection of the Tropic of Cancer at 16° E longitude and a straight line drawn toward Toummo as far as its intersection with the Niger boundary. This is the segment which was illustrated with the Niger boundary. This is the segment which was illustrated on the screen and which Mr. Maghur identified as the "Achilles' heel" of Chad's boundary.

Now if we consider the terms of Article 3 of the 1955 Treaty — under which the Parties recognized such boundaries as resulted from international agreements in force — and if we examine the 1902 Accord, which appears on the list in Annex I to the 1955 Treaty; what boundaries resulted from that Accord? None at all. So, in a sense, it may not really matter that on the critical date in 1951 the Accord was not, in fact, *en vigueur*: for it resulted in no boundary anyway.

Rebuttal of other points concerning the 1900-1902 Accords

I should like to turn next, Mr. President, Members of the Court, to a brief rebuttal of other arguments made by Professor Pellet concerning the 1900-1902 Accords. I have to say, with due respect, that in Chad's treatment of these agreements in the first round there appeared to be little efforts made to narrow the issues at all. One heard largely a repetition of Chad's written pleadings, interspersed with occasional suggestions of inconsistency on the part of Libya's counsel. So I will try to narrow the issues myself and to do it very briefly.

Italy's Recognition of a French Sphere of Influence only as to Morocco

The second argument that is basic to Chad's change of emphasis in setting out its second thesis is that Italy, in the 1900-1902 Accords, recognized a French sphere of influence right up to the boundary line of Tripolitanian boundary. But what about this sphere of influence argument?

To state in the simplest of terms how Professor Pellet described it, this argument follows the following remarkable course:

— It starts out with the 1899 Declaration and the false assumption that north of 15° N latitude the Declaration established a French sphere of influence. Professor Pellet incorrectly stated that, in its written pleadings, Libya did not contest that, in the 1899 Declaration, Great Britain recognized a French sphere of influence. That is wrong. Libya has consistently made it clear that north of 15° N latitude Article 3 of the Declaration was not a delimitation or recognition of spheres of influence or a recognition by Great Britain of a French sphere. The Article 3 line simply established a limit to a French zone.

— The next line in the argument is that in Mr. Barrère's declaration in the letter comprising part of the 1900 Accord the words "French sphere of influence" appear.

The text of this paragraph of Mr. Barrère's unilateral declaration to Italy has been put on the screen. Chad's argument is, *first*, that by the inclusion of these words, "French sphere of influence", Italy and France recognized that the 1899 Declaration reserved to France a sphere of influence and, *second*, that Italy indeed acknowledged that France had such a sphere of influence.

I pause here to show how truly remarkable such an interpretation is. For, Mr. Barrère's letter was a unilateral declaration by France concerning the effect of the 1899 Declaration. The 1900 exchange of letters contained no Italian acknowledgment or acceptance at all of the assurance contained in Mr. Barrère's declaration. But Professor Pellet tries to make a bilateral undertaking out of this, nevertheless. This is a paraphrase of his argument: "How could Italy be satisfied with there assurance if, at the time, Italy did not accept the validity of the French sphere of influence?

Professor Pellet argues that Italy could only have been satisfied with such a commitment if it had accepted the validity of France's sphere of influence? Why is this so? There is no meaning to

this argument.

The exchange of letters constituting the 1900 Accord was simply this. France sought Italian recognition of the French sphere of influence *in Morocco*. The Accord was one of a group of agreements between 1902 and 1911, under with France received such recognition from other powers: Germany, Great Britain and Spain. Italy, on the other hand, sought recognition as heir apparent to Tripolitania, which both France and Great Britain refused to give. Instead, Italy received a rather weak, non-reciprocal recognition of its potential sphere in Tripolitania. But, in addition, Italy obtained a clarification — a rather confused clarification, it must be said — of the effect of the 1899 Declaration upon Tripolitania, then under Ottoman sovereignty.

I now move on to the ext link in Chad's argument. This concerns the 1902 Accord between Italy and France. Unlike the 1900 Accord, this was bilateral agreement. Professor Pellet argued that this Accord by its *renvoi* to the 1900 Accord recognized the French sphere of influence said to have been established by the 1899 Declaration. The text of the pertinent part of the 1902 Accord is now on the screen. Chad's second thesis largely depends on the proposition that this clause, by its reference back to the 1900 Accord, constituting Italy's recognition of a French sphere of influence up to the Tripolitanian frontier shown on the *Livre jaune* map.

But this cannot be correct. The *renvoi* is to an Accord — the 1900 Accord — that certainly did not constitute Italian recognition of any French sphere of influence, as just discussed.

As a matter of law, if Italy, not being the territorial sovereign, had in fact recognized limits to Ottoman territory, this would involve a purely *personal* undertaking towards France. So when Italy became territorial sovereign in succession to the Ottoman Empire, Italy inherited the full title of the Ottoman Empire. If Italy then asserted that title against France, France might complain of a breach of the prior, personal undertaking: but France could not challenge the territorial title.

The absurdity of this line of Chad's argument based on the 1900-1902 Accords is seen again when one considers the object and purpose of the 1902 Accord. The French sphere of influence for which Italian recognition was sought concerned Morocco, and only Morocco. France had no idea or interest at the time of obtaining a commitment from Italy as to a sphere of influence in the regions around Tripolitania. France's position in Algeria and Tunisia had already been secured, and Italy

had no territorial status in the region, in any event, and no standing to recognize the rights of other Powers in the region. But like Great Britain, France was prepared to give Italy a guarantee to respect the status quo in Tripolitania and a vague promise of a free hand there if Italy one day should become heir to this Ottoman possession.

There was no Italian recognition of a French sphere of influence up to the wavy, dashed line in these agreements. France's only concern at the time related to Morocco. However, in 1902, in the light of Italy's renewal of its membership in the Triple Alliance, France also sought a commitment from Italy that the engagements Italy had entered into did not affect French standpoint. The further clarification in the 1902 Accord of Mr. Barrère's unilateral declaration in 1900 was purely subsidiary. It was made at Italy's request, for Italy wanted a more precise definition of France's commitment in 1900 as to the limit of any French advance eastward toward Tripolitania from France's possession of Tunisia and the northern part of Algeria.

I see, Mr. President, that we have reached 1 o'clock and this would be a good breaking time for me as well. If I could be called again tomorrow to resume?

The PRESIDENT: Certainly. Thank you very much, Mr. Sohier. We will break now and resume at 10 o'clock tomorrow morning.

The Court rose at 1 p.m.

CR 93/28

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Wednesday 7 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 7 juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajibola
	Herczegh
Judges ad hoc	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramadane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated, Mr. Sohier.

Mr. SOHIER: Mr. President, Members of the Court, when yesterday's session ended I had completed taking the Court through a quite detailed analysis of the 1900-1902 Accords. I had tried to demonstrate that the only conclusion to be reached was that in these Accords Italy recognized no Tripolitanian boundary and no French sphere of influence up to such a boundary.

Prinetti Declaration (1901)

Professor Pellet attempted to restore life to Chad's theory concerning the 1900-1902 Accords by reference to a speech of Foreign Minister Delcassé to the French Parliament in January 1902, a few weeks after Italian Minister Prinetti's in December 1901 had addressed the Italian Parliament. He suggested that Libya was careful to avoid mentioning the Delcassé speech, placing major emphasis instead on a particular word appearing in the Prinetti speech, a word that did not appear in the 1900 Accord (CR 93/23, pp. 23-24).

In my first intervention, I attempted to give the Court a careful explanation (CR 93/16, pp. 50-51 and pp. 54-56) of why the Prinetti speech was of direct legal significance in interpreting the 1900 Accord under the standards codified in the 1969 Vienna Convention. For the part of the Prinetti speech relating to the 1900 Accord had been co-ordinated word for word between the Italian and French Governments. Hence, it constituted, to quote from Article 31, paragraph 3, of the Convention, a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". It was not a question of one little word, as Professor Pellet has said; the whole statement of Signor Prinetti made clear that the 1900 Accord was concerned with the western part of Tripolitania's boundary, the sector bordering on the eastern side of France's African possessions.

The point was illustrated on a map that is now back on the screen. Signor Prinetti identified "the French sphere of influence" mentioned in the 1900 letter as being France's African possessions, to the east of which lay the *vilayet* of Tripoli. Signor Prinetti's jointly agreed statement established that the French sphere referred to in Mr. Barrère's 1900 unilateral statement was only the area

coloured blue on the map.

Professor Pellet, however, tried to build significance into the Delcassé speech made shortly after the Prinetti speech. He asserted that the texts of both speeches had been carefully co-ordinated. This is not supported by any evidence. The Prinetti speech was agreed word for word. The Delcassé speech was not co-ordinated with Italy at all. It was a self-serving, political speech aimed at offsetting criticism directed at the French Government for having neglected France's interests in the 1899 Declaration and, in any event, is an exaggerated, inaccurate description of the effect of the Declaration. That sort of speech can be accorded no legal significance in interpreting either the 1899 Declaration or the 1900 Accord under the rules set out in the Vienna Convention.

Professor Cassese made a final attempt to revive the 1900-1902 Accords in his discussion of the 1912 Tittoni-Poincaré Agreement. He started off on the wrong foot by saying that the essential purpose of the 1912 Agreement was to confirm the 1902 Accord, basing this on the reference to that Accord in the Agreement's preamble. He made things worse by incorrectly asserting that the Agreement was signed *before* Italian sovereignty over Tripolitania had been recognized, and that Foreign Minister Poincaré had insisted, before according such recognition, that the matter of territorial sovereignty be clarified.

With great respect, Professor Cassese's facts and conclusions are wrong. France had unconditionally recognized Italian sovereignty over Tripolitania as a result of the Treaty of Ouchy some days *before* the 1912 Agreement. The 1912 Agreement was France's *quid pro quo* for such recognition, and it consisted of a mutual most-favoured nation clause, which was set out in the second paragraph of the Agreement. The draft of the agreement prepared by France had made no reference to the 1902 Accord — this was added by Italy, as Professor Cassese correctly noted, so it could hardly have been the main purpose of the Agreement, which France had sought.

It is true that M. Poincaré initially had the idea of using this occasion to clarify the Tripolitania boundary matter with Italy — against M. Barrère's advice — , but the evidence placed on record in this case establishes that he abandoned this idea. It was left for separate negotiation with Italy, scheduled to begin in 1914, but which never took place due to the start of World War I.

Professor Cassese failed to mention the *travaux* set out in Libya's Reply (paras. 6.99 *et seq.*) demonstrating that Mr. Poincaré acknowledged that beyond Ghadamès there existed no Tripolitanian boundary. This evidence is added proof that Chad's contention that the wavy, dashed line shown on the *Livre jaune* map encircling Tripolitania was a boundary is wrong. It is added proof that that contention is wrong.

The conclusion that Professor Cassese's presentation led up to was that by the reference — one might say the *renvoi* — to the 1902 Accord, in the 1912 Agreement, Italy and France mutually agreed to recognize as the southern boundary of Libya the line appearing on the *Livre jaune* map which, according to him Italy recognized in 1902.

This is a sort of triple *renvoi*: from 1912 to 1902 to 1900. The fallacy is that no Tripolitanian boundary was recognized in the 1900-1902 Accords. And no French sphere of influence was recognized by Italy in these Accords, except as to Morocco.

Mr. President, Members of the Court, two official French maps were issued in 1912, and both are in evidence in this case.

There is on the screen the 1912 map that appears in Chad's Map Atlas. I draw the Court's attention to the top of this map, which is now being closed in on the screen, which shows the regions of Ghad an Toummo. There appears a yellow dashed line — interrupted n the south over a substantial portion of this curved line — , and it appears to resemble a part of the wavy, dashed line on the *Livre jaune* map. As the legend shows, it is now represented to be a boundary. This French map establishes the fact that France did not regard the wavy, dashed line to be a boundary at that time.

1899 Anglo-French Declaration

I turn next to the 1899 Declaration — but only to rebut Professor Pellet, for a lot of attention was devoted to the Declaration during the first round. I shall focus on two issues: *first*, in the Declaration was a French sphere of influence recognized to the north of 15° N latitude, *second*, what was the intended direction of the line described in Article 3 of the Declaration?

A Limit to a French Zone

Chad contends that in Article 3 of the 1899 Declaration a French sphere of influence was recognized by Great Britain up to the south-east line described in Article 3. Rather than to respond to Libya's arguments showing this contention to be wrong, Professor Pellet focused his attention on supposed shifts in position by Libya on this point as well as on alleged inconsistencies among the statements made here by Libya's counsel. Let me assure the Court that Libya has consistently maintained that in Article 3 of the 1899 Declaration neither a boundary nor a zone of influence was delimited or recognized. And in Professor Cahier's oral presentation which Professor Pellet referred to in making his accusations, Professor Cahier was dealing with the exchanges between Italy, Great Britain and France in the 1920s and 1930s where, admittedly, the terms used were sometimes inexact in the context of protesting the 1919 Convention. The concern at that time was over the change in direction of the south-east line and the incorrect French allegations that the Article 3 line had magically been turned into a boundary, not the supposed recognition by Italy of a French sphere of influence.

Turning to the text of Article 3 of the 1899 Declaration, Professor Pellet suggested that Libya relied on what he called a "subtle distinction" between the word "zone", which is the word appearing in the Article, and "sphere of influence". Well, I made an effort to explain shy the words "French zone" were selected in the last days of negotiation and not "French sphere of influence". The distinction is not "subtle"at all — quite to the contrary, the term "zone", as I explained in detail, was carefully selected in order *to avoid* any recognition of a French sphere of influence.

There is no need to repeat this explanation, which Chad just ignores. It is evident that the selection of the words "French zone" was not just a casual thing. In other contexts, zones and spheres of influence are often used interchangeably. But not here. The *travaux* confirm that the selection of the word "zone" was deliberate and that this word was not intended to mean the equivalent of "French sphere of influence". This was all carefully gone into by Libya during the first round.

Quotations from the pertinent *travaux* may be found in the transcript of my last intervention

(CR 93/16, pp. 36-38). It is clear beyond question that the French wished to avoid recognition of any British sphere of influence and that the British would not accept a text that expressed any recognition or definition of a French sphere of influence.

The text of Article 3 provided that the south-east line it described was the "limit of the French zone". Not "zone of influence" not "sphere of influence — "the French "zone". And Article 3 contained no expression of recognition of any zone or sphere. The context of Article 3 establishes that the choice of the word "zone" was intended specifically to distinguish the limit of a French zone established by the south-east line from a limit or boundary of a French sphere of influence.

I should like to make here another remark about the context of Article 3 and the clear indication that the choice of the word "zone" was not just sloppy drafting or a casual choice of words. The *travaux* show that the people actually doing the drafting were, on the British side, Lord Salisbury and Lord Sanderson; and on the French side, M. Cambon and M. Delcassé. Assisting them were Lord Everett of the War Office, in London, and M. Lecomte, in Paris. Messrs. Everett and Lecomte were experienced hands. They had both been on the delimitation commission that delimited the 1890 sphere of influence into a boundary between British and French territories in the 1898 Convention. They had, thus, been directly involved in the preparation and drafting of both the 1898 Convention and the 1899 Declaration. It is not plausible to believe that the shift in terminology to the word "French zone" was not deliberately done in the final draft of Article 3; and the reasons for this choice were set forth in my earlier intervention.

Direction of the Article 3 Line

Now, I shall take up again the question of the direction of the line described in Article 3 of the 1899 Declaration. The Court will recall that in my first intervention I explained why the direction of the line is such an important matter for Chad. If, as Libya believes is clearly the case, the direction of the Article 3 line was south-east, as the Article's text described it — and south-east is a precise cartographic direction — then instead of the "actes internationaux" listed in Annex I to the 1955 Treaty all pointing to one line, as Chad maintains, they pointed to two, quit different, lines, as is shown on the screen.

The 1899 Article 3 line was described as a south-east line. The so-called "interpretation" of that line in the 1919 Convention expressly modified its direction to be east-south-east. The *Livre jaune* map portrayed still a third line. None of these lines were boundary lines.

How can it be argued that the "actes internationaux" listed in Annex I produced just one line? If, as Chad argued in its Memorial, the 1919 line would take priority in the event of conflict between the lines, under the principle *lex posterior priori derogat* (see CML, paras./ 3.125-3.126 and 4.197), then why in the world did Article 3 and Annex I not simply say so by providing that the parties accepted the 1919 line as Libya's southern boundary? Of course, this still would have left no basis for the "western segment" of Chad's claimed boundary, which runs from the Tropic of Cancer toward Toummo.

Now what did Professor Pellet have to say about the direction of the line (CR 93/23, pp. 37-45)? First he repeated a Chadian argument that Libya had already rebutted (CR 93/1'6, p. 26). This is that the inclusion of the words "en principe" in Article 3 shows that the description of the line — "to the south-east" ("dans la direction du sud-est") — was not intended to be a "mathematical south-east line". But the context of Article 3 shows that "en principe" was *not* used in Article 3 to modify the description of the direction of the line, unlike Article 2 of the Declaration, where it did modify the description of the Article 2 line.

Professor Pellet then attempted to buttress this argument by relying on the words describing the direction of the line in Article 3: "dans la direction du sud-est" ("to the south-east"). This matter of textual interpretation was gone into in detail in the first round. I shall only mention a few pertinent points here:

— *First*, there is nothing imprecise about the description "to the south-east" ("dans la direction du sud-est"), and the context of Article 3 establishes that the term was intended to be precise. Similar terms of geographical direction run all through the 1898 Convention and may be found as well in the Declaration. I will not repeat my detailed analysis of this point (CR 93/16, pp. 31-32), except to mention one example. In Article 1 of the 1898 Convention the exact form of words — in that case "dans la direction de l'est" — was used to describe a line that necessarily was

intended to run true east since it followed a line of latitude.

— *Second*, in Italy's note verbale of 27 March 1924, from Italy's Ambassador in Paris to the French Foreign Minister (MC, Annex 104), protesting once again the 1919 Convention, the Italian Ambassador made an observation specifically related to the direction of the line described in Article 3 of the 1899 Declaration. The Italian Ambassador pointed out that the text of Article 3, in view of Italy, described a precise line. It was, he said, to take not just any south-east direction ("non pas . . . *une* direction quelconque sud-est") but *the* south-east direction ("mais bien *la* direction du sud-est").

— *Third*. The third point is that the *travaux* confirm the fact that "to the south-east" ("dans la direction du sud-est") was intended to mean precisely that — a true south-east line. This is illustrated by the 19 March proposal tabled by Lord Salisbury that would have "pushed", as M. Cambon put it, the Article 2 boundary up to 18° N latitude. The map used in the first round to describe this incident is on the screen. By pushing the Article 2 boundary north to 18°, the direction of the line from there to the end-point at the Tropic of Cancer was no longer north-west (they of course were talking from south to north rather than from north to south at this point), it was no longer north-west but west-north-west. This was at a time, as I said, that the negotiations were considering the line as running from south to north.

In Lord Salisbury's draft, the line he proposed was described as running "in a north-westerly direction". Lord Salisbury — and M. Cambon — and those advising them in London and Paris — and those advising them in London and Paris — were hardly as naive about geographical directions as Professor Pellet has suggested.

The unassailable proof that the British negotiators knew the difference between south-east and east-south-east was the note of Lord Sanderson to Lord Salisbury, which is again on the screen. Professor Pellet only read to the Court one sentence of this note: "I do not know that it matters much." The real significance of this note did not involve that sentence but concerned the intended direction of the line. Lord Sanderson pointed out to Lord Salisbury that the line on the *Livre jaune* map, which he had just been given a copy of, was wrong. And I might add here Lord Sanderson was

not the British Ambassador in Paris at the time. He never was the British Ambassador in Paris. He was a right-hand man of Lord Salisbury during the negotiations preparing the drafts. He happened to be in Paris when he sent this note because he was there for the initialling of the Treaty. Now, in his note to Lord Salisbury, Lord Sanderson said it ran east-south-east (that is ESE) instead of SE, south-east. And he added, referring to the map, *"otherwise"* — that is, except for this error — it seems fair. That is the same as saying: "they made a mistake in the direction of the line".

Great Britain subsequently issued official War Office maps that depicted the Article 3 line as a strict or true south-east line. There is no record of any French protest.

However, Chad in its Reply introduced a 1923 note of a Mr. MacMichael of Great Britain's Sudan Service that seems to challenge this conclusion (CR, Vol. 2, Ann. 43) for that note asserted that the early War Office maps issued up until 1914 had showed more of an east-south-east line than a south-east line. Then, argued Mr. MacMichal, the War Office, in the course of a general revision of maps, made a faulty, literal reading of Article 3 of the 1899 Declaration and modified the line on official British maps to be a strict south-east line. Chad did not comment on this evidence in its Reply or during the first phase of oral hearings, although Libya specifically invited Chad to do so before Libya itself commented. So libya now must say something about it.

Mr. MacMichael, who was based in the Sudan Service headquarters in Khartoum, clearly had incomplete knowledge of the British maps issued. During the first round, Libya put on the screen the 1899 Royal Geographical Society's map, issued shortly after the signing of the 1899 Declaration. It showed the Article 3 line as following a strict south-east direction. Libya has also found a reproduction, in a published work, of a War Office map of 1906 (see, Hertslet's *Map of Africa by Treaty* and printed by His Majesty's Stationery Office; see, also, Robinson and Gallagher, *Africa and the Victorians*, 2nd ed., 1981, maps at the end). The Article 3 line on this 1906 map, now on the screen, is shown as following a strict south-east direction.

I should like to make a few other comments about this map. As the Court can see, the wavy, dashed line appears on it, but to the west of the starting-point of the Article 3 line at the Tropic of Cancer this line is clearly not shown as any kind of boundary (that portion right there). However,

east and north of the Tropic, the wavy, dashed line is marked by the same symbol as the Article 2 lines of the 1899 Declaration, a symbol identified on the legend as a boundary not yet surveyed. I wonder if we could have the full map back for a minute to show the legend? The legend is right there and the line that follows this course and runs all the way to the Mediterranean matches this line on the legend and that line is identified as a boundary not yet surveyed.

This seems to make no sense; neither France nor Great Britain regarded the Article 3 south-east line as a boundary in 1906, and neither does Chad. Remarkably this unsurveyed boundary is shown as a British boundary all the way to the Mediterranean, so it hardly gives support to the argument that in the 1900-1902 Accords a French sphere of influence was recognized up to that line. Unexplainedly, the map would seem to imply a British sphere right up to that line, which in 1899 was exactly what the French wanted to avoid recognizing. However, this map is evidence of the official British view as to the direction of the line described in Article 3 of the 1899 Declaration and confirms the same view shown on the 1899 map of the Royal Geographical Society.

There is no evidence on record in this case of any pre-1919 War Office map showing other than a strict south-east line, and Libya has not seen such a map. Of course, after 1919, the direction of the line on British maps was switched to east-south-east in conformity with the 1919 Anglo-French Convention.

I should like to complete my discussion of the direction of the Article 3 line by mentioning again the incident of 19 March 1899, when Lord Salisbury presented a new draft. This was just two days before signature.

Professor Pellet suggested that it is Libya that has tried to turn this episode into an important event (CR 93/23, p. 40), overlooking that it was Chad's Counter-Memorial (para. 8.99) that described it as a "crucial episode". So, once again, Chad seems to be trying to back away from evidence it once thought to be particularly important.

Liby's analysis in its written pleadings of what happened on 19 March, as summarized during the first round, was said by Professor Pellet to be "absolutely extraordinary". But, Mr. President, that analysis was nothing more than an analysis of the facts.

It will be recalled that on 19 March Lord Salisbury made the proposal, set forth in a new draft, to push the Article 2 boundary north to 18° N latitude and from there to draw the Article 3 line west-north-west to the Tropic of Cancer (that is, as he put it in his draft, in a "north-westerly direction"). His proposal and what then occurred will now be illustrated on the screen.

At the time, the *boundary* under the drafts being exchanged — the boundary of Article 2 of the 1899 Declaration — ended at 15° N had not yet been precisely delimited.

What Lord Salisbury proposed was that the Article 2 boundary be extended (or "pushed" as M. Cambon described it) to 18° N latitude; and from there to draw a line in a north-westerly direction to the point of intersection of 16° E longitude and the Tropic of Cancer. Thus, the proposal concerned extending northward the Article 2 boundary. The line drawn from there to the Tropic of Cancer was not the issue, as seen from M. Cambon's report that he rejected Lord Salisbury's proposal because it was "impossible to push the delimitation up to the 18° parallel".

Where the interpretations of Libya and Chad differ concerning the proposal is that Chad wrongly assumes that what M. Cambon meant was that Lord Salisbury proposed pushing *The Article 3 south-east line* done — that is southward —, while, as shown on the screen, Lord Salisbury was proposing to push the Article 2 boundary line up — that is northward — to 18°. As M. Cambon said, Lord Salisbury proposed to push the *delimitation* up to 18° N. latitude. The only delimitation involved concerned the Article 2 boundary.

The description I have just given of what happened during this crucial episode, to repeat Chad's words, is clearly seen from an examination of Lord Salisbury's draft itself. His proposal involved a revision of the Article 2 line, which concerned the boundary being delimited from south to north. What he proposed was not to stop the boundary at 15° N, as past drafts had done, but to continue it north to 18° N latitude.

The direction of the Article 3 line, of course, depended on how far north the Article 2 extended. If it stopped at 15° N latitude, the Article 3 line was a strict south-east line. If it was "pushed" north to 18° N, it became an east-south-east line.

What Professor Pellet argues is that Lord Salisbury and M. Cambon on 19 March were

starting from an Article 2 sector that extended north to 19° N latitude, and hence corresponds to the line on the *Livre jaune* map. He contends that M. Cambon rejected "pushing" the end-point of the south-east line *southward* to 18° N latitude.

But, this fanciful interpretation bears no relation to the text of Lord Salisbury's proposal. For, he was describing the Article 2 line. His description was from south to north as in all the past negotiations. He proposed "pushing" the end-point of the Article 2 boundary north from 15° N to 18° N. If Professor Pellet were right, the hand-written proposal now on the screen would show the figure 18° crossed out and the figure 19° substituted, not 15°. For this copy of the hand-written proposal shows the change accepted in his proposal by Lord Salisbury. He agreed to abandon his idea of pushing the Article 2 boundary north to 18° N and accepted the end-point of 15° N. The two Parties, thus, had agreed that the Article 3 line would follow a strict north-west/south-east direction.

M. Cambon rejected the proposal because he was anxious not to exclude definitively from any future French possessions the regions just north of Darfour. Lord Salisbury accepted M. Cambon's objection as the text of his proposal on the screen reveals. The figure 18° is crossed out and 15° has been written in.

The 19 March episode, thus, is proviso that confirm Libya's interpretation of Article 3 that the line described was intended to be a south-east and not an east-south-east line as shown on the *Livre jaune* map. It demonstrates that on 19 March the negotiators agreed that the north-west/south-east line would run between the Tropic of Cancer and 15° N latitude. The difficulties of finding the precise point, and the clever solutions found to deal with this problem, were fully discussed by Libya during the first round.

Chad has made much of the fact that Great Britain launched no official protest to the *Livre jaune* map, on which the Article 3 line was shown as an east-south-east line. The reasons for British forbearance have been set out in Libya's written pleadings (see, CML, paras. 6.35-6.36).

But this is really a trivial argument. The important point is that Great Britain's own maps showed clearly the British view of the intended direction of the line described in Article 3 — strict south-east. There is not a hint in any evidence before this Court, or that Libya has seen, that France

Professor Cot's map demonstration

Professor Cot asserted no less than four times that not a single map produced after 1919 showed a strict south-east line for the Article 3 line of the 1899 Declaration (CR 93/25, pp. 32, 33, 39 and 46). The demise of the strict south-east line is not true, as I shall demonstrate. Professor Cot's incorrect assertion reminds one of Mark Twain's remark after reading in the newspaper reports of his own death. He said: "Reports of my death are greatly exaggerated." And so it is with the strict south-east line.

The Court will recall Professor Conforelli's demonstration of Italian maps, which revealed that all Italian maps, on which the Article 3 line appeared, showed it to be strict south-east in direction. Such maps did not come to an end in 1919. In Libya's Memorial there appeared three Italian maps produced *in 1926* showing the same line (ML, Maps 70, 71 and 72). These maps are now appearing on the screen. They are numbers 89, 90 and 91 in the Judge's Folder.

The later Italian maps omitted the Article 3 line entirely, and emphasized the absence of a Libyan southern boundary. But when that line was shown on Italian maps, it was always shown as a strict south-east line.

There is also a very recent map that Professor Cot overlooked entirely in his presentation. This map is now on the screen. It is a map that was attache ' to the OAU Subcommittee Reports of 1987 and 1988, and it appears in Volume 2 of Libya's Reply. It is number 88 of the Judge's Folder. The direction of the line of Article 3 of the 1899 Declaration shown on this map is a *strict* south-east line. There is no indication or record in this case that Chad expressed any objection to this map.

So the line of Article 3 of the 1899 Declaration, shown on maps as a strict south-east line, had not vanished after 1919. It was alive and well as late as 1988.

Summary: boundaries maps

I should like to conclude my remarks by showing on the screen the boundary situation at the end of 1912, when the Treaty of Ouchy was entered into an Italy inherited the Ottoman rights and titles. This Mr. President, you may recall involved a map I called for at the end of my last ever protested these official British maps.

I shall now turn to a few points made by Professor Cot in his map presentation concerning maps bearing on the subject of the intended direction of the Article 3 line.

presentation but which the *éminence grise* behind the curtain failed to produce on the screen. Perhaps we will have the same problem because as yet I do not see it, but I think it will appear. It is here. Neither the wavy, dashed line encircling Tripoitania or the south-east line of Article 3 of the 1899 Declaration appear on the map, for they were not boundaries, and this is a map depicting the boundaries in 1912. I shall say in respect to this map, Mr. President, that Libya does not take any position with respect to boundaries shown on this map affecting other States only.

Now the map on the screen will shown some evolution. It will show the boundaries as they evolved up until 1934 as a result of the various international agreements entered into — and to again refer to Article 3 of the 1955 Treaty, it will show the boundaries that resulted from "actes internationaux", but for this purpose, irrespective of whether these "actes" were *en vigueur* on the critical date.

The first demonstration is the green line of the 1910 Franco-Italian Accord. Now we see the boundary delimited under Article 2 in the 8 September 1919 Anglo-French Accord. And we see the boundary of Article 2 extended under the 1924 Protocol, the Anglo-French Protocol. And now we have the 1925 boundary with Egypt. And finally the 1934 boundary with Sudan. And that on the eve of the 1935 Treaty was the boundary situation described and recognized in Article 3 of the 1955 Treaty. This map incidentally is No. 63 in the Judge's folder. I will not show the changes in the maps resulting from the 1935 Treaty because as we know the ratifications of the Treaty were not exchanged and the boundary never became an international boundary.

However, we have placed again on the screen the 1941 Italian map. It portrays the same boundary situation as the map depicting the boundaries up to 1934. There is no boundary east of Toummo. And this situation did not change during the next ten years, which brings us to 1951, the critical date.

The final map on the screen illustrates Article 4 of Libya's Constitution. This is No. 4 in the Judge's folder; and I invite the Court to follow with me the text of Article 4 (No. 11 in the Judge's folder) as it will be illustrated on the screen.

This is the way Article 4 begins. It says the boundaries of the United Kingdom of Libya are:

on the north, the Mediterranean Sea; on the east, the *boundaries* of the Kingdom of Egypt and of the Anglo-Egyptian Sudan; on the south, nowhere the word boundaries: on the south, the Anglo-Egyptian Sudan, French Equatorial Africa, French West Africa and the Algerian desert; on the west, the boundaries of Tunisia and Algeria. This is what was recognized under Article 3 of the 1955 Declaration.

Thank you, Mr. President, this completes my remarks. I would be grateful if you would call on Professor Condorelli.

The PRESIDENT: Thank you very much, Mr. Sohier.

Professor Conforelli.

M. Condorelli :

1. Introduction

Merci, Monsieur le Président, permettez-moi de commencer ma plaidoirie d'aujourd'hui par un témoignage d'admiration à l'égard des éminents conseils et amis de l'autre côté de la barre, qui nous ont livré d'éblouissantes plaidoiries. En les écoutant, je n'ai pu éviter de penser à la réponse bien tournée que Mme de Maintenon, la maîtresse de Louis XIV, donna à l'impertinent personnage qui lui avait demandé des indiscrétions intimes au sujet du roi. La grande dame répondit par la phrase célèbre : "Chez le grand roi, tout est grand !". *Mutatis mutandis*, je crois qu'on peut dire à peu près la même chose de nos remarquables contradicteurs : chez eux, tout est remarquable, y compris l'extraordinaire capacité de présenter les faits et les normes relatifs au présent différend sous une lumière si inattendue qu'ils finissent par assumer un aspect très différent par rapport à celui qu'avait perçu jusque-là un esprit fort candide comme le mien.

Nous avons même eu droit, Monsieur le Président, à un véritable coup de théâtre qui complique peu ma présent tâche puisqu'il s'est agit d'un changement important de la thèse soutenue par la Partie adverse pour ce qui est de la position de l'Italie. Depuis le début du siècle, la France avait surtout soutenu que, par le biais de l'accord franco-italien de 1900-1902, l'Italie aurait reconnu que la sphère d'influence de la France au nord du lac Tchad se prolongeait jusqu'à la ligne figurant sur la carte du *Livre jaune*, soi-disant annexée à la déclaration franco-anglaise de 1899 et que cette ligne, telle qu'"interprétée" par la convention franco-anglaise de 1919, serait ou serait devenue une frontière opposable à l'Italie, toujours en vertu de la reconnaissance italienne de 1902. A son tour, le Tchad avait repris à son compte cette théorie. Mais le 29 juin 1993, à la 11e heure, tout a changé sous les yeux mêmes de votre Cour : le Tchad a déclaré (CR 93/23, p. 34 et suiv.) que la Libye avait parfaitement raison de considérer une telle thèse comme insoutenable et nous a distillé sa nouvelle vérité. En réalité, nous dit-on maintenant, en 1902 l'Italie n'a pas accepté comme limite de la sphère d'influence français la ligne de sud-est mais seulement la ligne ondulée entourant la Tripolitaine dans la carte du *Livre jaune*. Ce serait donc tout de suite au-delà de cette ligne que commençait, d'après

le Tchad, la sphère d'influence réservée à la France : dans ces régions, la France aurait pu faire ce qu'elle voulait vis-à-vis de l'Italie qui n'avait par conséquent aucun titre juridique pour protester ni contre le déplacement de la ligne de sud-est, effectué au moyen de l'accord franco-anglais de 1919, ni contre la transformation de cette ligne en frontière véritable.

Monsieur le Président, mon collègue M. Sohier a déjà présenté le point de vue de la Libye au sujet de la virevolte tchadienne concernant l'accord franco-italien de 1900-1902 : une virevolte que mon éminent ami, le professeur Pellet, range sans doute pudiquement parmi les "ajustements" sur des points de détail dont il a parlé dans sa dernière plaidoirie (CR 93/26, p. 69). Je ne vais pas revenir sur ce thème, puisque ma tâche est de répondre aux arguments présentés pendant la phase orale par la Partie tchadienne, concernant la période italienne (1912-1947). Mais il est évident que, pour m'en acquitter, il m'incombe de prendre en compte la nouvelle théorie du Tchad, en essayant de faire de mon mieux pour surmonter les difficultés que provoque cette modification soudaine des points de repère.

Je suis cependant quelque peu soulagé par le sentiment de ne pas être seul dans l'embarras : en effet, je constate que certains des éminents conseils du côté tchadien ont eu, eux aussi, de la peine à changer leur fusil d'épaule si rapidement. Ainsi, par exemple, vendredi 25 juin dernier, l'un des conseils du Tchad a déclaré que "The Franco-British Convention of 1919 confirmed the course of the line, setting forth in writing what they had agreed in 1899, and had been accepted by Italy in 1902 on the basis of the map" (CR 93/21, p. 59). Mais non, chers amis, ce n'est pas ainsi : l'agent tchadien a démontré le mardi suivant que ce n'est pas cette ligne-là que l'Italie aurait acceptée en 1902 ! A son tour, le même mardi, un autre conseil du Tchad a soutenu que, lors de la négociation de l'accord Tittoni-Poincaré de 1912, les négociateurs français ne soulevèrent pas la question de la frontière méridionale de la Libye pour une raison, dit-on, évidente : c'est qu'elle ne prêtait pas à discussion puisqu'"elle était clairement établie par les accords franco-italiens de 1902" (CR 93/23, p. 51). Un peu plus loin dans la même plaidoirie nous avons entendu également que, grâce à la référence aux accords de 1902 contenue dans l'accord Tittoni-Poincaré de 1912, "l'Italie, désormais souveraine en Libye, s'engageait à considérer la carte de 1899 comme déterminant la frontière

méridionale de la Libye" (*ibid*., p. 51 et suiv.) Mais non, Messieurs de l'autre côté de la barre : l'engagement de 1902 de l'Italie, suivant la toute dernière thèse du Tchad, ne portait pas sur la ligne qui représenterait (d'après la France à l'époque et le Tchad aujourd'hui) la frontière méridionale de la Libye, mais sur une autre ligne !

De toute façon, rien de grave ou de répréhensible dans cela : la Partie tchadienne a certes le droit de changer de thèse tant qu'elle veut et elle aura la possibilité de remédier la semaine prochaine aux apories qu'une conversion de dernière minute a pu provoquer. Mais il est tout de même extraordinaire que dans la même tout de plaidoiries le Tchad se soit évertué à démontrer que la Partie libyenne aurait modifié ses positions au fil des ans et qu'elle mériterait d'être sanctionnée par votre Cour pour cela !

2. Le traité d'Ouchy de 1912

Ceci étant précisé, je voudrais maintenant traiter rapidement du traité d'Ouchy de 1912, par lequel la Libye était cédée par l'Empire ottoman à l'Italie. Je constate avant tout qu'il n'y a pas de vrai désaccord entre les Parties quant au principe *nemo dat quod non habet* et à son application en l'espèce : il est clair que la Turquie a transmis à l'Italie la totalité du territoire libyen tel que la Porte le possédait en 1912, à l'instar de tous les titres territoriaux pertinents, ainsi que le droit d'exercer sa souveraineté sur toutes les populations libyennes qui avaient été soumises jusque-là à l'autorité ottomane. Certes, il y a une divergence de vue très nette entre la Libye et le Tchad quant à l'identification de l'"instantané territorial" au moment de cette succession. Puisque d'autres membres de l'équipe libyenne se chargeront demain de revenir sur cette question, je n'ai pas besoin de m'en occuper maintenant. Je voudrais pourtant observer, avec un certain étonnement, que le Tchad ne souffle mot des arguments, pourtant significatifs, que la Libye a cru pouvoir tirer de l'interprétation des dispositions du traité d'Ouchy. De plus, le Tchad préfère garder un silence embarrassé concernant la pratique subséquente, alors que celle-ci montre que la Porte se retira de la zone qui forme l'objet du présent différend en application du traité : elle l'interpréta donc comme la cession de cette zone aussi, et rassura même la France à ce sujet.

Monsieur le Président, personne ne saurait contester au Tchad le droit de ne pas répondre aux

argumenta juridiques formulés par la Libye au premier tour de plaidoiries. Il serait par contre discutable si le Tchad décidait d'y répondre au dernier moment, en se soustrayant ainsi à un débat judiciaire correct.

3. La reconnaissance par la France de la succession entre l'Empire ottoman et l'Italie

Il est vrai, cependant, que l'essentiel des argumentations tchadiennes ne porte pas sur les relations entre l'Italie et l'Empire ottoman découlant du traité d'Ouchy, mais sur les relations franco-italiennes au moment de l'acquisition par l'Italie de la souveraineté sur le territoire libyen. La Partie tchadienne prétend — vous l'avez entendu — qu'à cette occasion l'Italie aurait renoncé à l'héritage ottoman, alors que la Libye soutient qu'il n'en est rien.

A ce stade de la procédure, je pourrais m'abstenir de revenir sur ce thème puisque le Tchad a préféré reprendre telle quelle son argumentation écrite sans répondre à l'analyse libyenne. Je dois cependant relever que les propos présentés par le Tchad à ce sujet sont malheureusement entachés d'erreurs factuelles graves qui déforment totalement les événements pertinents. D'abord nos éminents contradicteurs oublient que, déjà deux jours après le traité d'Ouchy, le 20 octobre 1912, la France reconnut unilatéralement et sans la moindre réserve la souveraineté italienne sur la Libye, alors que l'accord bilatéral Tittoni-Poincaré date de huit jours plus tard et qu'il est donc postérieur à ladite reconnaissance unilatérale et autonome par rapport à celle-ci. Ensuite, je dois confirmer que l'accord en question ne comporta, du côté français, aucune réserve de caractère territorial. Je veux dire par là qu'il ne comporta ni de réserve explicite française (ce qui d'ailleurs n'aurait pas été concevable s'agissant d'un traité bilatéral), ni de réserve implicite : et il est tout à fait étonnant de voir la Partie tchadienne s'obstiner à prétendre le contraire au mépris des preuves précises qui se dégagent des travaux préparatoires. Il est vrai, en effet, qu'à un moment donné de la négociation le Président du Conseil français souhaita obtenir de l'Italie des assurances concernant la seule frontière algéro-tripolitaine (et non pas la frontière méridionale) mais les travaux démontrent au-delà de tout doute qu'il renonça par la suite à cette intention sous la pression de l'ambassadeur de France à Rome, M. Camille Barrère. De toute façon, ces débats ne concernaient que la frontière occidentale de la Libye, alors qu'il ne fut jamais, jamais question des limites vers le sud du territoire libyen. La

Partie tchadienne d'ailleurs le reconnaît quand elle affirme que la raison de cela était que cette frontière méridionale "était clairement établie par les accords franco-italiens de 1902" (CR 93/23, p. 51); ce sont les mots utilisés par le conseil du Tchad. Monsieur le Président, ces propos ne sont pas seulement erronés : ils sont devenus désormais quelque peu, comment dirais-je, cocasses, maintenant que le Tchad vient de nous informer (comme l'a dit le professeur Pellet) qu'"une étude plus attentive" l'a convaincu que l'échange de lettres franco-italien de 1902 ne portait pas en réalité (sauf éventuellement pour un tout petit bout) sur la frontière méridionale de la Libye, mais sur une autre ligne, la soi-disant "frontière de la Tripolitaine" (CR 93/23, p. 34).

Je constate aussi, Messieurs les juges, que le Tchad n'a pas répondu à l'argument avancé par la Libye qui concerne l'interprétation même du texte du traité Tittoni-Poincaré. Ce traité engage les parties à ne pas créer d'obstacle aux mesures susceptibles d'être adoptées à l'avenir, respectivement, par la France au Maroc et par l'Italie en Libye et les engage aussi à s'accorder réciproquement le traitement de la nation la plus favorisée; le traité explique clairement que ces engagements se déduisent des accords franco-italiens de 1902. Voilà quelles étaient les obligations que les deux parties reconnaissaient explicitement comme découlant des accords de 1902 : elles n'en ont, en revanche, rien déduit concernant les frontières libyennes, au moment où l'Italie devenait souveraine en Libye : c'est, de l'avis de la Libye, la preuve la plus claire que les accords de 1902 étaient perçus tant par la France que par l'Italie comme n'ayant aucune espèce de pertinence pour ce qui est du dossier des frontières.

4. La nouvelle thèse tchadienne est réfutée par la conduite de la France et de l'Italie après 1912

Monsieur le Président, il me semble évident que le traité Tittoni-Poincaré de 1912 ne porte aucun appui à la nouvelle thèse du Tchad concernant les effets des accords franco-italiens de 1900-1902 : ce n'est pas le fait de changer de cheval en cours de route qui rend moins impraticable le chemin choisi par la Partie tchadienne. Ceci d'autant plus que cette nouvelle théorie, encore plus que l'ancienne, est radicalement en contradiction avec la pratique subséquente tant de la France que de l'Italie. Jugez-en, Messieurs les Membres de la Cour, à la lumière de la carte qui apparaît maintenant à l'écran. Cette carte va permettre de représenter visuellement la nouvelle thèse

du Tchad, d'après laquelle les accords franco-italiens de 1902 et de 1912 n'ont pas rendu opposable à l'Italie la ligne de la déclaration franco-anglaise de 1899 dans aucune de ses trois versions (à savoir la version dite "mathématique", celle du *Livre jaune* et de 1899, et celle de la convention franco-anglaise de 1919; vous les avez vues apparaître, ces trois lignes, tour à tour à l'écran). Ces lignes, nous dit-on aujourd'hui, *ne* concernaient que les relations entre la France et la Grande-Bretagne, et non pas l'Italie dans ses relations avec la France. Nous pouvons donc maintenant les effacer et faire apparaître la soi-disant frontière de la Tripolitaine dont le Tchad nous dit maintenant qu'elle avait été acceptée par l'Italie en 1902 et confirmée en 1912. Au-delà de cette ligne, qui limitait donc aux dires du Tchad la sphère italienne, commençait la sphère réservée à la France, que l'Italie s'était — nous dit-on — engagée avec la France à respecter. Mais l'a-t-elle fait, Monsieur le Président ? Et si l'Italie *ne* l'a pas fait, la France a-t-elle protesté contre de telles violations de ses droits ? La réponse à ces questions est nette et se dégage on ne peut plus clairement du dossier : c'est non, c'est deux fois non !

Prenons d'abord la pénétration italienne vers le sud de la Cyrénaïque : elle s'est faite très graduellement et entre mille difficultés et revers, à cause de la résistance acharnée des tribus locales organisées et guidées par la Sénoussia, qui s'est battue bec et ongles pour chaque mètre du territoire libyen. Ceci amena le Gouvernement italien, qui pour l'heure ne contrôlait réellement que les côtes, à pactiser avec la Sénoussia pendant toute la période allant jusqu'en 1923 en essayant de mettre en place un système de souveraineté partagée sur le modèle ottoman. Prenons par exemple l'accord de El Regima du 25 octobre 1920 entre l'Italie et la Sénoussia : par cet accord, l'émir Idriss (le futur roi Idriss) était investi par l'Italie, entre autres, du droit d'administrer de façon autonome les oasis du sud, par exemple Koufra et Djaraboub, que vous voyez situées à l'extérieur de la soi-disant frontière de la Tripolitaine, ainsi que du droit d'être consulté avant l'établissement des actes législatifs italiens relatifs à la Libye, conformément aux prescriptions du traité d'Ouchy. Puis, en 1923, la dénonciation de tous les traités avec la Sénoussia décidée par le Gouvernement fasciste va déclencher une nouvelle guerre, et avec elle la campagne militaire qui amènera très lentement les forces armées italiennes à s'emparer, au prix de terribles combats, de ces oasis du sud : ainsi, par exemple, après de

multiples vicissitudes, Djaraboub tombera en mains italiennes en 1926, puis ce sera le tour, par exemple, de Koufra en 1931.

Monsieur le Président, Messieurs les juges, ce n'est pas l'amour pour l'histoire qui m'amène à citer ces événements. Mon but est de vous signaler que, si toute la dernière thèse du Tchad était exacte, tous ces comportements de l'Italie auraient dû constituer autant de violations des engagements conventionnels souscrits par elle à l'avantage de la France en 1902 et en 1912. Or, vous le savez, la France non seulement n'a jamais songé à protester, mais au contraire, a félicité l'Italie pour les succès militaires qu'elle remportait progressivement sur le terrain. La Partie tchadienne dira sans doute que la France n'était pas intéressée par ces territoires qu'elle avait remis à la sphère d'influence anglaise; mais, mis à part que l'Angleterre non plus n'a pas protesté, est-il crédible que la France se soit publiquement réjouie de ce qui constituait des violations par l'Italie des droits qu'elle avait envers cette même Italie ?

A vrai dire, il y a des protestations pendant cette période; mais, curieusement (évidemment, curieusement pour le Tchad), elles ne viennent pas de la France : elles viennent toutes de l'Italie. L'Italie, d'une part, s'élève contre la convention franco-anglaise de 1919 et exclut que cette convention — ***res inter alios*** —puisse engendrer un quelconque effet pour elle. D'autre part, dès 1930, l'Italie fait valoir l'illicéité du comportement des autorités françaises lorsque celles-ci décident d'installer des postes militaires dans le Tibesti (à Bardaï, à Wour, à Sherda), ou à Tekro et à Nadi Agdébé (mémoire du Tchad, annexes 125 et 140 et production 36), bien au sud de la prétendue "frontière de la Tripolitaine" : vous avez vu à l'écran, grâce à des flèches, où se trouvent ces localités. Il n'a donc jamais effleuré l'esprit du Gouvernement italien qu'il s'était soi-disant engagé envers la France à se contenir à l'intérieur de la ligne entourant la Tripolitaine. Quant à la France, elle a certes repoussé les protestations italiennes; mais la plupart du temps elle l'a fait au nom de la théorie que le Tchad a désormais répudiée.

En conclusion, Monsieur le Président, tant avec la nouvelle qu'avec l'ancienne thèse du Tchad, les choses ne changent pas : aucune convention internationale n'a jamais tracé valablement et de façon à être opposable à l'Italie une frontière dans la région avant 1935; en particulier, aucun

instrument international n'a engagé l'Italie à accepter ou à reconnaître l'une quelconque des lignes sur lesquelles se fonde la prétention tchadienne. Les cartes géographiques de source italienne que j'ai eu l'honneur de présenter à votre Cour pendant le premier tour de plaidoiries sont le reflet fidèle de la situation juridique qu'elles décrivent. Et je n'ai donc pas besoin de revenir sur ces cartes, d'autant plus que de l'autre côté de la barre aucune critique sérieuse n'a été présentée à leur sujet.

5. Les cartes italiennes

Cependant, Monsieur le Président, certaines observations avancées par un éminent conseil du Tchad m'obligent à une brève réplique. C'est que nos honorables contradicteurs, sans doute préoccupés par l'impact du matériau cartographique italien de source officielle — et on les comprend ! — ont effectué une tentative assez désopilante d'effacer quelque peu sa crédibilité. A défaut d'autres arguments plus efficaces, ils se sont réfugiés dans un scénario tout à fait romanesque. Il faut croire d'ailleurs qu'ils chérissent le roman fantastique, puisque nous avions déjà pu écouter un récit saisissant et plein de vie qui portait sur le déroulement des réunions des conseils de la Libye. Cette fois-ci un nouveau chapitre du roman a été rajouté, dont le titre pourrait être, je pense, le suivant : "Les cartographes fous". On nous informe, en effet, qu'il ne faut pas faire confiance aux cartes italiennes qui "ne correspondent guère aux positions prises par le Gouvernement italien"et qui s'expliqueraient à cause de la "zizanie entre les services italiens" (CR 93/25, p. 31).

Vous voyez la scène, Messieurs les juges : au ministère des affaires étrangères italien il y avait, entre 1906 et 1941, un service de cartographes mentalement dérangés, qui passaient leur temps à biffer sur les cartes géographiques les frontières qu'acceptait leur Gouvernement ! Sans doute la Partie tchadienne pense que des arguments de ce genre — plutôt faciles, sinon folkloriques — ont des chances d'être convaincants : dans ses écritures, d'ailleurs, elle s'était déjà largement appuyée sur le désordre administratif qui, à son sens, régnait en Italie à l'époque, voire sur ce qu'elle appelle la guerre entre les divers ministères, et ainsi de suite.

Puisque je suis en train de parler de cartes, je saisis l'occasion pour dire un mot aussi de l'affaire de la carte scolaire de 1930. La seule vraie critique qui nous est faite par la Partie tchadienne à ce sujet est d'avoir tiré des déductions, au demeurant parfaitement logiques, de

deux faits.

Le premier est que, face à une protestation de la France, les autorités italiennes décidèrent d'adopter la solution de laisser en blanc la zone contestée (qui figurait auparavant sur la carte comme faisant partie de la Libye), et ceci afin de faire ressortir qu'aucune délimitation n'avait été convenue dans la zone. Le deuxième fait est qu'aucune protestation ultérieure du côté français n'est connue. La déduction est que nous sommes autorisés à penser que la solution adoptée par les autorités italiennes n'a pas dû paraître inacceptable aux autorités françaises.

Si je comprends bien, nos éminents contradicteurs trouvent que cette conclusion ne se justifie pas du tout, à moins que nous ne prouvions que la France n'a pas protesté de nouveau. C'est, en somme, une sorte de *probatio diabolica* qu'on nous demande ! Tout ce que je puis dire à ce sujet c'est que les recherches très soigneuses menées par la Libye dans les archives diplomatiques françaises n'ont pas permis de trouver une quelconque note de protestation ultérieure. Nous ne doutons pas que le Tchad, de son côté, a mené des recherches aussi diligentes, et le fait qu'il n'ait rien trouvé lui non plus nous conforte dans notre conclusion. Quant aux documents italiens relatifs à cette affaire, ils sont si nombreux, si concordants qu'il est étonnant de voir le Tchad mettre en doute ce qui se dégage de leur analyse.

6. Les confirmations de l'absence de délimitation pouvant être dégagées du traité de 1935, du communiqué de presse et de l'exposé de motifs

Monsieur le Président, il est temps maintenant de revenir encore une fois au traité de Rome de 1935 qui, dans l'esprit de la Partie libyenne, ne représente en fait rien de plus qu'une confirmation — une confirmation très convaincante — de tout ce qui se dégage déjà nettement d'un examen effectué sans parti pris des événements antérieurs : à savoir, qu'aucune délimitation n'avait jamais été établie auparavant dans la zone en question. Les deux Parties se sont désormais très longuement appesanties sur cette question, en mettant chacune en valeur ses arguments : à votre Cour de trancher.

Je voudrais cependant signaler que dans les plaidoiries de la Partie adverse je n'ai pas été capable de déceler un seul argument que la Libye n'ait pas déjà examiné en profondeur et dûment

refuté, à l'exclusion — peut-être — de celui relatif au terme "cession" qu'on trouve effectivement dans plusieurs documents tant français qu'italiens de l'époque portant sur le traité de 1935. Mon éminent collègue et très cher ami, le professeur Cassese, a beaucoup insisté sur ce sujet important sur lequel il conviendra donc de s'arrêter comme je le ferai sous peu. Pour le restant, je dois avouer ma surprise de voir la plupart du temps la Partie adverse répéter sans le moindre ajout des propos déjà entendus, en oubliant de prendre en compte les réponses très documentées que la Libye a eu l'occasion de donner : il en est ainsi, par exemple, à propos des termes "restent en territoire français" qui figurent à l'article 2 du traité, ou à propos de la nature juridique et des effets du communiqué de presse de 1935, à la lumière de la jurisprudence internationale.

Je note aussi que nos éminents contradicteurs, après nous avoir accusé d'adopter une approche qu'il qualifient de "biaisée", l'adoptent eux-mêmes sans le moindre embarras. Ainsi, par exemple, dans les deux passages de l'exposé des motifs du projet français de loi de ratification du traité de Rome de 1935, que j'avais commenté au premier tour, et que vous voyez réapparaître à l'écran, le conseil du Tchad a soigneusement sélectionné le membre de phrase où il est question de ce que l'Italie "s'était refusée à reconnaître que la ligne de démarcation, etc.", ceci dans le but d'alléguer que la France n'entérinait pas la version qui était et qui est restée italienne, par contre, le même conseil tchadien ne souffle mot de l'admission solennelle, qui est quant à elle dépourvue de toute ambiguïté et clairement imputable au Gouvernement français, suivant laquelle à l'est de Toummo il n'y a pas de frontière conventionnelle, c'est dans le premier passage, et qu'une telle absence de frontière, comme dit le deuxième passage, est gênante pour les autorités des deux pays.

Soit dit en passant, Monsieur le Président, Messieurs les juges, j'avoue que je ne comprends pas très bien pourquoi le Tchad continue à critiquer (CR 93/24, p. 71) la thèse italienne, telle qu'elle est résumée dans le premier passage de l'exposé des motifs que vous voyez toujours à l'écran : cette thèse, Monsieur le Président, n'est rien d'autre que la nouvelle thèse du Tchad dont j'ai parlé au début de ma plaidoirie d'aujourd'hui ! Peut-être la France, à l'époque, ne l'avait pas entérinée cette thèse, mais le Tchad l'a faite sienne pas plus tard que la semaine dernière !

7. Les confirmations venant des documents anglais

Monsieur le Président, je suis très sensible à l'invitation de l'un des éminents conseils du Tchad, le professeur Cassese, qui propose d'offrir à votre Cour un tableau aussi complet que possible des éléments et facteurs permettant d'évaluer au mieux la signification du traité de Rome de 1935 : ce tableau, à vrai dire, est désormais plus que complet, et la Partie libyenne — me semble-t-il — a contribué dans une mesure largement prépondérante à cela. Cependant, on peut faire encore davantage en ce sens. Dans ce but, je voudrais rappeler comment la Grande-Bretagne évalue la situation existant dans les années trente concernant les limites méridionales du territoire libyen.

A ce propos, je voudrais souligner à nouveau l'intérêt que présente un autre communiqué de presse de l'année précédente : celui anglo-italo-égyptien du 21 juillet 1934 par lequel les trois pays reconnaissaient que la frontière entre la Cyrénaïque et les possessions françaises en Afrique centrale était toujours à déterminer ("still to be fixed") (mémoire de la Libye, vol. IV, p. 227). Si je reviens sur ce document, que vous avez déjà vu, puisqu'il vous a été présenté par le professeur Cahier, c'est d'abord pour signaler que la Libye l'avait produit dès son mémoire, et non pas tardivement comme un éminent conseil du Tchad l'a prétendu à tort (CR 93/21, p. 61). La deuxième raison est que ce document ne peut certainement pas être accusé d'utiliser un langage approximatif, confondant démarcation et délimitation : alléguer cela — comme ledit conseil de la Partie adverse l'a pourtant fait — implique la méconnaissance totale du contenu même de l'accord du 20 juillet 1934 portant délimitation de la frontière entre le Soudan anglo-égyptien et la Libye, auquel cet autre communiqué de presse se rapporte pour en illustrer le sens. L'accord en question, je le rappelle, n'avait pas identifié le point terminal, vers le sud, de la frontière entre le Soudan et la Libye justement pour la raison explicitée par le communiqué : à savoir parce que la frontière entre la Libye et le futur Tchad était encore "still to be fixed".

Mais il n'y a pas que cela, Monsieur le Président. De façon parfaitement cohérente, la Grande-Bretagne a ensuite clairement indiqué que le traité de Mussolini-Laval de 1935 devait être défini comme un accord qui délimitait pour la toute première fois la frontière dans la région, étant donné que "the frontier in this area had previously not been determined and the territory in question

was in dispute" : le mémoire libyen (p. 330) a cité divers documents de 1935 du Foreign Office, tous orientés dans le même sens.

Sans doute, la Partie tchadienne ne se privera pas de remarquer que ces documents, provenant d'Etats tiers, ne pouvaient d'aucune façon engager la France. Formellement le Tchad aurait raison de le soutenir mais il aurait tort en substance : la Grande-Bretagne, en effet, savait mieux que quiconque de quoi elle parlait, puisque — ne l'oublions pas — elle était partie aux accords de 1899 et de 1919 qui constituent les pièces maîtresses de la prétention française de l'époque et de la prétention tchadienne d'aujourd'hui.

Pour le moins ces prises de positions adoptées par la Grande-Bretagne dans les années trente enlèvent toute crédibilité à ce que dira le 14 octobre 1949 un représentant du même pays à l'Assemblée générale des Nations Unies. L'éminent conseil du Tchad qui, le 28 juin dernier, a rappelé avec emphase l'opinion de M. McNeil, d'après lequel la Libye avait "well delimited frontiers" (CR 93/22, p. 57), a oublié de signaler que de toute évidence ce distingué diplomate anglais connaissait très mal le dossier : il ignorait, en particulier, ce que le Gouvernement de Sa Majesté britannique avait très officiellement et très publiquement déclaré quinze ans plus tôt. Or, nos contradicteurs n'ont pas prétendu, que je sache, que la détermination de la frontière tchado-libyenne serait intervenue entre 1934 et 1949.

8. Pourquoi des documents tant français qu'italiens parlent de "cession" au sujet du Traité de 1935

Monsieur le Président, le seul argument avancé par le Tchad en plaidoirie au sujet du traité de 1935, qui mérite une réponse attentive, je l'ai déjà dit, est celui mettant en évidence l'usage, fait dans plusieurs documents des années trente, du terme "cession" à propos du traité : si des deux côtés on parlait ainsi, nous dit-on, c'est que la France et l'Italie reconnaissaient que le traité envisageait la cession d'une portion de territoire français à l'Italie.

Monsieur le Président, Messieurs les Juges, dans ses écritures la Libye avait déjà fourni une explication très détaillée, montrant pourquoi certains documents italiens parlent de "cession" : c'est que l'application du traité de Rome, s'il était entré en vigueur, aurait effectivement impliqué un retrait des forces militaires françaises des quelques localités de la zone au nord de la ligne de 1935 où elles

venaient de s'installer, et simultanément une remises de ces localités entre les mains italiennes. Il n'est donc pas du tout étonnant que du côté italien on ait parlé de "cession", mais ceci pour décrire l'ensemble d'opérations concertées qui auraient dû se dérouler sur le terrain; mais ceci ne signifie nullement qu'on ait envisagé une "translation" du titre de souveraineté sur le territoire concerné, puisqu'au contraire pour les Italiens ce territoire était un territoire italien illégalement envahi par les Français : il ne faut pas oublier, en effet, qu'au moyen de toute une série de notes de protestation très précises, l'Italie avait clairement dénoncé la présence illégale des forces françaises dans la zone. On doit donc exclure que les documents italiens dont il est question puissent être interprétées comme le fait la Partie adverse, qui les évalue de façon erronée puisqu'elle ne prend pas en compte le contexte historique.

Quant aux documents français, l'explication des termes en question est encore plus évidente, et ne justifie d'aucune façon le ton triomphaliste de nos éminents contradicteurs. Il suffit de rappeler que, déjà avant la première guerre mondiale, les autorités françaises avaient mis au point leur stratégie de négociation, à utiliser à l'avenir avec l'Italie : la position de départ de la France, je l'ai rappelé, consistait dans la théorie d'après laquelle la frontière méridionale de la Libye était déjà délimitée, puisque l'Italie avait soi-disant "adhéré" en 1902 à la déclaration franco-anglaise de 1899, et avait donc accepté la ligne figurant dans la carte prétendument annexée à ladite déclaration. D'après cette théorie, donc, cela aussi je l'ai rappelé au premier tour de plaidoiries, il ne serait resté qu'à démarquer la frontière, parce que la délimitation était déjà chose faite.

Monsieur le Président, grâce à la conversion de la Partie adverse au cours de la phase ultime de la présente procédure, nous avons pu constater que la théorie française était effectivement dénuée de fondement, puisqu'il est admis que l'Italie n'a pas accepté cette ligne de 1899. Il n'empêche que dans les années trente cette théorie représentait la position officielle de la France. Par conséquent, il n'est pas du tout étonnant que du côté français on ait déclaré que le traité de Rome envisageait la cession d'un bout de territoire français à l'Italie : ce qui explique les expressions que les conseils du Tchad se sont fait un plaisir de collectionner, comme si leur nombre pouvait — par une sorte d'effet cumulatif — donner de la force à une thèse clairement contredite par tant d'éléments concordants du

dossier.

J'ajouterai que dans les milieux français avertis on savait bien où était la vérité : la note du Quai d'Orsay du 1er janvier 1935, que la Libye avait citée dans son mémoire (mémoire de la Libye, p. 324) est la preuve la plus nette qui soit de ceci et le fait, souligné on ne sait pas pourquoi par la Partie adverse, que la note en question ne comportait pas de signature, n'enlève évidemment rien à sa signification. D'autant plus que le langage utilisée dans cette note est très proche parent de celui qui figure dans le fameux exposé des motifs de 1935, dont je viens de parler encore une fois. Et il faut aussi signaler, Monsieur le Président, Messieurs les Juges, que Laval lui-même, dans son discours au Sénat du 26 mars 1935, avait clairement fait comprendre que le traité de Rome n'était pas vraiment un accord de rectification de frontière, mais plutôt un accord de délimitation (mémoire de la Libye, p. 329).

Monsieur le Président, si vous le jugez opportun cela pourrait être un moment approprié pour l'interruption. Thank you.

Le PRESIDENT : Thank you very much. We shall take ou break now.

L'audience est suspendue de 11 h 25 à 11 h 40.

Le PRESIDENT : Please be seated. Professor Condorelli.

M. CONDORELLI : Merci, Monsieur le Président.

9. La pratique subséquente : l'incident de Jef-Jef et le dossier de la commission d'armistice

Monsieur le Président, deux épisodes postérieurs à 1955 ont attiré sur les propos que j'avais pu présenter le 17 juin dernier les foudres de la Partie tchadienne. S'agissant d'incidents mineurs, je ne vais pas y revenir longtemps. Quelques rapides mises au point seulement, afin de corriger les inexactitudes qui se sont glissées dans l'analyse de nos honorables contradicteurs.

Concernant l'épisode de Jef-Jef, le premier point à signaler est qu'il ne faut pas confondre les dates et se tromper sur l'ordre chronologique des notes diplomatiques échangées; deux seules notes

diplomatiques. La note italienne est la première, et elle exprime, par un langage il est vrai très poli, le mécontentement du Gouvernement italien face aux Français qui avaient interrompu des travaux de génie civil menés par l'Italie dans la zone qu'on appellera quarante ans plus tard la "bande d'Aouzou". La note diplomatique française du 20 juin 1938 est donc la réponse à une protestation italienne, et non pas vice-versa. Cette précision donne à elle seule une toute autre couleur à l'histoire qu'on nous a racontée.

Le second point est qu'une seule fois, une seule fois, les militaires français ont interrompu les travaux des ouvriers italiens en causant de ce fait la réaction de l'Italie qui annonça aussitôt la reprise de ces travaux, cette fois-ci sous escorte militaire. Cette reprise, Messieurs les juges, ne fut nullement interrompue par les Français, contrairement à ce que prétend la Partie adverse : c'est la note diplomatique française qui en témoigne, lorsqu'elle observe que l'incident est clos puisque les Italiens sont repartis vers Koufra mais de leur propre chef, et non parce qu'éloignés par la force.

La troisième précision est qu'il ne ressort pas du tout qu'il y ait eu une troisième fois, contrairement à ce qu'on prétend de l'autre côté de la barre. Si la Partie tchadienne entend faire allusion au récit contenu dans un document français du 8 janvier 1939 qu'elle même a produit (contre-mémoire du Tchad, vol. IV, p. 545), je lui ferai noter qu'au cours de la rencontre fort courtoise et en plein désert dont il y est question, l'officier italien avait communiqué à son homologue français qu'il n'avait pas l'ordre de reprendre les travaux de forage et qu'il l'aurait fait savoir s'il en recevait un. Est-ce cela la reconnaissance par l'Italie de la souveraineté française sur le territoire concerné ?

La quatrième précision concerne le croquis de la zone envoyé par Balbo au ministère des affaires étrangères italien, que la Partie tchadienne a montré (CR 93/24, p. 82) en lui accordant une importance totalement démesurée. On voudrait faire croire qu'un simple croquis, destiné exclusivement à faire comprendre où se trouvait la localité en question, du seul fait de faire figurer le tracé représentant la thèse française, impliquerait la reconnaissance par l'Italie du bien-fondé de cette thèse. On voudrait faire croire, en somme, qu'un simple croquis aurait la vertu de balayer la force probatoire de la série ininterrompue des cartes officielles italiennes que j'ai eu l'honneur de vous

présenter le 17 juin dernier. Mais pourquoi alors, par exemple, une carte officielle postérieure à notre croquis (celle de 1941, que vous revoyez encore une fois à l'écran) ne comporte aucune indication de frontière ?

Il y a encore une dernière précision à faire, Monsieur le Président, au sujet des marques de souveraineté que les militaires italiens avaient laissés sur les lieux. Vous vous souvenez sans doute, Messieurs les juges, des gloussements que l'éminent conseil du Tchad a eu lorsqu'il vous a décrit, le 30 juin dernier, la nature de ces marques : du papier à en-tête placé dans des tonneaux; c'est futile, nous dit-on ! Rien à voir, bien entendu, avec l'importance des marques de la souveraineté française par lesquels ils furent remplacés : figurez-vous, du papier à en-tête français mis dans les mêmes tonneaux (contre-mémoire du Tchad, vol. IV, p. 342) !

Quant à l'affaire de la commission d'armistice de 1942, une seule remarque s'impose. Je ne vois pas, vraiment pas, comment nos éminents contradicteurs peuvent s'acharner à soutenir que l'Italie aurait reconnu le bien-fondé des allégations françaises, alors que les autorités italiennes se limitèrent à ranger la question de la délimitation de la frontière parmi celles à régler après la fin de la guerre.

10. La question concernant les effets du traité de paix sur les accords bilatéraux franco-italiens

Monsieur le Président, pour des raisons purement chronologiques, je voudrais maintenant vous présenter quelques remarques sur un sujet ayant trait à l'interprétation du traité de paix de 1947. Je veux faire allusion à la question de l'abrogation ou non des traités bilatéraux franco-italiens qui n'ont pas été notifiés après la guerre comme le demandait l'article 44 du traité de paix.

Vous avez entendu un éminent conseil du Tchad s'élever contre l'analyse présentée par la Libye, à laquelle il a reproché avec force et arguments qu'elle serait radicalement mal fondée (CR 93/21, p. 76 et suiv.) Je prends acte de ces critiques. Je dois cependant observer dès le départ que la brillante réfutation de la Partie adverse s'adresse non seulement à la Libye, mais avant tout au Tchad lui-même qui, dans son mémoire (p. 123), n'avait pas soutenu une thèse foncièrement différente de la nôtre. Le Tchad avait soutenu que la France n'avait pas notifié les accords franco-italiens relatifs aux anciennes colonies italiennes, justement parce qu'elle souhaitait s'en

libérer afin de pouvoir s'approprier des portions importantes de ces territoires. En effet, la France espérait obtenir gain de cause au moyen des procédures prévues à cet effet par le traité de paix. Mais son dessein ne put pas aboutir puisque les autres puissances d'abord, puis l'Assemblée générale, ne le permirent pas : elles refusèrent de procéder à la redéfinition des frontières des ex-colonies italiennes que le traité de paix les autorisait à effectuer.

Monsieur le Président, l'Assemblée générale aurait donc pu remodeler le territoire de la Libye, comme des autres colonies italiennes, en vertu du pouvoir normatif que lui accordait en l'espèce l'annexe XI du traité de paix. Heureusement, elle ne le fit pas. Elle prit une toute autre décision, elle aussi obligatoire, que nous connaissons bien : celle de préserver les frontières libyennes qui avaient été délimitées à l'époque coloniale et de déléguer à la France et à la Libye, après l'indépendance de celle-ci, la charge de délimiter les frontières qui n'avaient pas été fixées précédemment. Autrement dit, c'est à la décision de l'Assemblée générale qu'est dû le maintien en vigueur des traités bilatéraux de délimitation relatifs aux ex-colonies italiennes y compris, bien évidemment, l'accord franco-italien du 12 septembre 1919 relatif à la frontière algéro-libyenne. Par contre, les accords franco-italiens de 1900-1902, du fait même qu'indiscutablement ils ne sont pas des accords de délimitation de frontières, n'ont pas été maintenus en vigueur par l'Assemblée générale : ils n'étaient donc pas en vigueur non plus à la date de l'indépendance de la Libye.

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Monsieur le Président, la résolution 289 (IV) de l'Assemblée générale reste l'une des preuves les plus décisives que la frontière méridionale de la Libye n'avait pas été délimitée avant 1950. L'importance de cette preuve est énormément rehaussée par le constat que l'Assemblée générale ne considéra pas nécessaire d'adopter la même décision pour les frontières orientales de la Libye parce que celles-ci avaient été, quant à elles, toutes bien délimitées par voie conventionnelle avant l'indépendance de la Libye. Ce qui implique, *a contrario*, la reconnaissance claire, par l'Assemblée générale, qu'il y avait bien des frontières non délimitées entre la Libye et les territoires français.

11. Les indications positives qui se dégagent de l'héritage colonial

Monsieur le Président, toutes les observations que je viens de vous présenter contribuent remarquablement, je l'espère, à étayer la première conclusion essentielle que la Libye vous a soumise : dans la zone en question aucune délimitation de frontière n'a jamais été établie jusqu'à aujourd'hui. Permettez-moi maintenant de supposer que votre Cour veuille bien décider que cette conclusion est fondée en droit.

Dans ce cas, votre Cour devra alors déterminer elle-même la délimitation en appréciant les titres juridiques de part et d'autre et en identifiant leur extension territoriale. C'est en songeant à cette hypothèse qu'au premier tour de plaidoirie, je vous avais soumis respectueusement toute une série d'arguments juridiques qui, selon la Libye, devraient être pris en considération dans ce but et qui se rattachent à la période coloniale. Je voudrais maintenant revenir rapidement sur ce sujet, afin de répondre aux objections formulées oralement par la Partie adverse.

La première considération est que nos honorables contradicteurs n'ont soulevé aucune critique quant à la pertinence et à l'applicabilité des dispositions figurant à l'annexe XI du traité de paix de 1947, qui imposait aux quatre puissances d'abord, et à l'Assemblée générale ensuite et maintenant impose à votre Cour, de délimiter les frontières de la Libye qui n'ont pas été déterminées avant 1951 "en tenant compte des aspirations et du bien-être des habitants, ainsi que des exigences de la paix et de la sécurité". La Libye prend acte volontiers de cette absence de contestation.

Il en va tout autrement, par contre, quant à la pertinence d'autres facteurs susceptibles de jouer un rôle dans ce contexte.

Le premier de ces facteurs est celui de l'"héritage colonial". A ce sujet, il faut tout de suite et encore une fois repousser fermement l'accusation totalement infondée de la Partie adverse suivant laquelle la Libye remettrait en discussion les *frontières héritées du colonialisme*. La Libye est accusée de vouloir rouvrir le contentieux colonial par la prétention — carrément délirante — de faire payer aujourd'hui au Tchad les dettes territoriales que la France n'avait pas satisfaites jadis envers l'Italie. C'est là, Messieurs les juges, une défiguration inacceptable des prétentions libyennes. Pourquoi prêter à la Libye des propos aussi insensés et hérétiques, étant donné que celle-ci a mis au clair depuis sa première écriture combien elle souhaite que votre Cour juge avant tout si une délimitation de la frontière avec le Tchad a été effectuée ou non à l'époque coloniale ? Etant donné qu'elle a dit et répété que, si la Cour devait donner une réponse affirmative à cette question, le différend serait réglé et la Libye se conformerait fidèlement à votre décision ?

Mais si votre réponse devrait être négative, Messieurs les juges, la Cour devra alors sélectionner et peser toutes les données pertinentes pour régler le présent différend, y compris, d'après la Libye, celles qui se rattachent à l'article 13 de l'accord de Londres de 1915. Permettez-moi de préciser de la façon la plus objective possible à quelles conditions, aux yeux de la Libye, cette disposition pourrait jouer un rôle dans la présente affaire. La première condition est que l'article 13 puisse être interprété comme applicable afin de déterminer une frontière pour la première fois, et non pas seulement pour des cessions territoriales. La seconde est qu'il puisse être interprété comme se référant à la question qui forme l'objet du présent différend. La troisième est qu'on puisse en déduire des indications suffisamment précises pour aider à délimiter la frontière. La quatrième et dernière est que les droits et obligations prévus se rapportent à un "régime de frontière" suivant le principe consacré à l'article 11 de la convention de Vienne sur la succession d'Etats aux traités, c'est-à-dire qu'elles aient un caractère territorial, et non pas purement personnel. Sur chacune de ces questions, vous l'avez entendu, Messieurs les juges, les Parties sont en désaccord et vous demandent de trancher.

J'ajouterai seulement, Monsieur le Président, que l'article 23 du traité de paix, à savoir le fait que l'Italie a renoncé à tous ses droits et titres coloniaux, n'a par contre aucune espèce de pertinence ici. La renonciation de l'Italie ne saurait produire la moindre conséquence pour la Libye, dont les droits successoraux trouvent leur source dans les règles de droit international général en matière de succession aux traités et non pas dans la volonté de l'Etat prédécesseur.

12. Les indications découlant de la délimitation de 1935

Bien plus importante aux yeux de la Libye est la question de savoir si la délimitation non entrée en vigueur de 1935 peut offrir à votre Cour des indications utiles afin de régler le présent différend à défaut d'une ligne de l'*uti possidetis juris*.

De ce côté-ci de la barre nous avons longuement expliqué pourquoi, de l'avis de la Libye, les caractéristiques du traité de Rome, les circonstances dans lesquelles il a été conclu et les raisons pour lesquelles il n'est pas entré en vigueur aident de façon significative à identifier l'étendue territoriale des titres juridiques pertinents. La Partie tchadienne, par contre, a refusé de nouer le dialogue à ce sujet et a préféré ne pas expliciter son point de vue à la Cour. Ainsi, elle n'a pas du tout indiqué pourquoi, à son sens, l'Italie n'a pas voulu procéder à l'échange des ratifications alors que le traité était — d'après le Tchad — très avantageux pour elle, puisqu'il prévoyait, toujours suivant l'avis du Tchad, une importante cession de territoire de la France à l'Italie. Bien entendu, nos contradicteurs n'ont pas donné leur version non plus concernant les raisons qui ont pu amener la France à faire inutilement la cour à l'Italie pendant quelque quatre ans, en essayant par tous les moyens de la convaincre d'accepter ce qui pourtant représentait, aux dires du Tchad, un joli don de quelque 114 000 km^2 de territoire français. Si le commerçant avide, dans la parabole que nous a racontée une éminent conseil du Tchad, si ce commerçant, qui représente l'Italie dans cette parabole, n'a pas voulu conclure le contrat, c'est que peut-être la prétendue bonne affaire n'en était pas une !

Monsieur le Président, les circonstances dans lesquelles un traité de délimitation non ratifié avait été conclu et les raisons en ayant empêché l'entrée en vigueur ont été considérées par votre jurisprudence comme des facteurs à prendre soigneusement en considération afin de régler un différend territorial : c'est ce que la Libye a fait valoir tant dans ses écritures que dans ses

plaidoiries. Le Tchad, tout en ne semblant pas vouloir repousser les enseignements de votre jurisprudence, conteste que cela soit possible en l'espèce puisque, à son sens, des facteurs équitables comme celui-ci ne pourraient jouer qu'un tout petit rôle pour des toutes petites portions d'une frontière. J'avoue humblement, pour ma part, que je ne comprends pas pourquoi, en cas d'absence de la ligne de l'*uti possidetis juris*, l'équité *infra legem* devrait entrer en jeu pour tracer des lignes courtes et non pas pour des longues : le *ratio* d'une telle distinction m'échappe complètement. Mais je tiens à souligner qu'on déforme de façon caricaturale l'argument présenté par la Libye lorsqu'on prétend que celle-ci vous demanderait en l'espèce une délimitation entièrement basée sur l'équité.

Non, Monsieur le Président, la Libye n'a jamais proposé que vous fassiez recours à l'équité *praeter legem* (ou *contra legem*). Ce que la Libye demande est seulement qu'il soit équitablement tenu compte de la délimitation non entrée en vigueur de 1935, *afin de déterminer l'étendue territoriale des titres juridiques en présence de part et d'autre*. Et je souligne aussi que lorsque la Libye se réfère à la délimitation de 1935, elle n'entend pas du tout faire appel exclusivement à la ligne de 1935 mais à tout l'ensemble de facteurs, d'intérêts et de raisons qui avaient amené à retenir cette ligne plutôt qu'une autre, ainsi qu'à tout l'ensemble des facteurs, d'intérêts et de raisons qui ont amené par la suite la France et l'Italie à ne pas échanger les ratifications.

Une dernière considération, Monsieur le Président. En écoutant les propos de la Partie adverse à ce sujet, j'ai eu la sensation (je le dis avec tout le respect) que celle-ci a une conception bien étriquée du rôle de l'équité dans les délimitations terrestres et, plus généralement, du rôle de l'équité dans le raisonnement d'un juge international.

En prenant connaissance des importantes opinions séparées des juges Shahabuddeen et Weeramantry jointes à votre arrêt du 14 juin dernier dans l'affaire de la *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège)*, dans lesquelles ces questions sont étudiées en profondeur, j'ai noté par exemple les observations faites à propos du rôle de l'équité dans le processus difficile d'évaluation, d'équilibrage et d'appréciation générale des arguments et des requêtes des parties à une procédure de règlement judiciaire, notamment en matière de délimitations. Qu'il me soit permis de citer, en guise de conclusion sur ce point et en m'abstenant de tout

commentaire, un court passage de l'opinion séparée de M. Shahabuddeen (p. 58) : "difficulties of this kind experienced in discharging the task of the Court are not enough to take the Court beyond the province of the judicial mission". Monsieur le Président, Messieurs les juges, je vous remercie. Monsieur le Président, je voudrais vous demander de bien vouloir proposer à M. Cahier de venir à la barre.

Le PRESIDENT : Thank you very much Mr. Condorelli. Mr. Cahier.

M. CAHIER : Monsieur le Président, Messieurs les juges,

Le but de ma plaidoirie d'aujourd'hui est de voir si après le traité de 1955 la situation juridique a été modifiée d'une manière ou d'une autre, mais je n'examinerai pas le traité de 1936 qui ne concerne pas notre différend.

Si modification il y a, elle n'a pas pu intervenir que de deux façons: 1) soit par la conclusion de nouveaux traités; 2) soit par le comportement des Parties.

I. Voyons tout d'abord les traités qui ont été conclus par la suite

Ils l'ont été entre la Libye et le Tchad.

Le premier date de 1966, et nos honorables contradicteurs lui ont prêté de l'importance sans toutefois l'analyser en profondeur, ou disons plutôt qu'ils ont essayé d'y trouver ce qui leur convenait. D'après eux, cet accord prouverait *a)* que la Libye reconnaissait que la frontière entre les deux pays était délimitée sur la base de celui de 1955; *b)* que si tel n'avait pas été le cas, la Libye n'aurait pas conclu un accord de ce type (mémoire du Tchad, p. 33). Il est évident que si la première proposition se révèle fausse la deuxième l'est également.

La Libye a montré dans ses écritures que le traité de 1966 ne délimitait aucune frontière, qu'il n'y avait eu aucune négociation à ce sujet entre les parties et que, contrairement à la convention de bon voisinage de 1955 entre la Libye et la France, celui de 1966 ne se référait aucunement à l'article 3 du traité de 1955.

Le traité de 1966 a un but et un but précis, il s'agit 1) d'assurer entre les deux Etats une

coopération en matière de sécurité et; 2) d'accorder des facilités de circulation aux populations locales.

En un certain sens, le traité de 1966 est comparable à la convention de bon voisinage de 1955. Alors pourquoi en conclure un nouveau ? La raison en est simple, Messieurs de la Cour, et nous reviendrons là-dessus plus en détail : bien que le Tchad soit devenu indépendant en 1960, les Français n'en sont pas partis et sont toujours présents dans la région et comme l'a dit le professeur Sorel : "Il y a une continuité des hommes." (CR 93/25, p. 71)

Il est donc compréhensible que lors du départ des troupes françaises, en 1965, le Tchad ait voulu pour son propre compte conclure un traité de bon voisinage avec la Libye.

Mais voyons donc d'un peu plus près ce traité de 1966. D'après l'article 2 :

> " Le Gouvernement libyen et le Gouvernement tchadien s'engagent à accorder des facilités de circulation aux populations installées de part et d'autre de la frontière à l'intérieur des zones géographiques délimitées par les points ci-dessous :
>
> En ce qui concerne le Royaume-Uni de Libye : Koufra, Gatroum, Mourzouk, Oubari, Ghat.
>
> En ce qui concerne la République du Tchad : Zouar, Largeau, Fada."

Le mot magique de frontière étant prononcé, nos honorables contradicteurs croient triompher, ils s'exclament : "Vous voyez bien qu'il y a une frontière entre les deux pays autrement cet article n'aurait pas de sens !"

Ils semblent oublier toutefois que le traité mentionne aussi, à ce même article, des zones géographiques et, à son article 4, des zones frontalières.

Nous l'avons vu, c'est une zone délimitée par un certain nombre de points : en Libye : Koufra, Gatroum, Mourzouk, Oubari, Ghat; au Tchad : Zouar, Largeau, Fada.

Pour mieux apprécier la situation géographique, une carte apparaît sur l'écran. Vous y voyez une zone grise avec au nord les points indiqués comme étant en Libye et ceux au sud comme étant au Tchad.

Messieurs de la Cour, entre le point de Faya Largeau au sud et la limite nord de cette zone il y a environ 750 kilomètres. C'est plus que la distance entre Nice et Paris. Et l'on voudrait nous faire croire qu'une frontière existait entre les deux pays. Messieurs, lorsque deux Etats établissent un

régime transfrontalier cela ne va guère plus loin que 10 à 20 kilomètres mettons — même 30. Ici, on en est à 730 kilomètres. Ici, la région est tellement vaste que, comme vous pouvez le voir sur la carte, la stricte ligne sud-est résultant du traité de 1899, celle de 1919 et celle découlant du traité de 1935 y trouvent aisément leur place. En vérité, une chatte n'y retrouverait pas ses petits.

Si l'on veut éviter de déformer la réalité, le but du traité de 1966 est parfaitement clair. En l'absence d'une ligne frontière délimitée, la Libye et le Tchad ont voulu parer au plus pressé : assurer la liberté de circulation des populations nomades dans une vaste région géographique.

Mais alors c'est la deuxième proposition tchadienne que je désire retourner à nos contradicteurs : si le Tchad était convaincu de l'existence d'une frontière établie par le traité de 1955, comment a-t-il pu signer le traité de 1966 qui prouve exactement le contraire ? En effet, si, comme le dit le Tchad, aujourd'hui la frontière est représentée par la ligne résultant du traité de 1919, la convention de 1966 aurait dû mentionner Aouzou en territoire tchadien. Or il n'en est rien, Aouzou se trouve dans la zone grise de la carte que vous avez sous les yeux. C'est donc bien la preuve que dans cette vaste région il n'y a pas de frontière précise. Elle restait à être délimitée.

Messieurs, si en 1966 il n'y a pas de frontière, il n'y en a surement pas plus dans la période successive. Les quatre traités qui semblent tellement déplaire à nos contradicteurs n'ajoutent rien à l'affaire. Celui de 1972 concerne l'amitié entre les deux pays. Celui de 1974 mentionne le terme de frontières pour en contester la notion même. Le professeur Sorel nous dit à ce sujet "Il parait ... pour le moins difficile d'affirmer [que cette contestation] est l'expression d'une absence de frontière." (CR 93/25, p. 83.) Attention, je n'ai jamais dit cela Messieurs; au point de vue de la détermination ou de l'indétermination de la frontière le traité de 1974 n'ajoute rien. Si je l'ai cité c'était en tant que preuve de l'acquiescement du Tchad. Le traité de 1980 est ce fameux traité d'alliance. D'après ce que dit le professeur Sorel le traité n'aurait pas été conclu par un véritable Gouvernement tchadien (CR 93/25, p. 83); nous reviendrons là-dessus, mais si tel était le cas pourquoi ne pas avoir soulevé sa nullité en son temps ? Enfin le traité de 1981 "ouvre les frontières" entre les deux pays mais, de l'autre côté de la barre, on l'a tellement discrédité que l'on se demande comment le Tchad peut s'y référer. De toute manière, la Partie adverse n'a pas soutenu qu'en 1981 il y avait eu une négociation

en vue de la délimitation de la frontière.

Monsieur le Président, Messieurs de la Cour, je crois pouvoir conclure ce point en indiquant qu'entre 1955 et 1981 rien n'est changé : il n'y avait pas eu de délimitation de frontière en 1955, il n'y en a pas en 1981, date du dernier traité entre la Libye et le Tchad.

En fait, le seul accord qui pouvait avoir un quelconque intérêt pour notre différend c'était celui de 1966. Il confirme de manière éclatante la thèse libyenne.

Mon analyse a donc montré qu'aucun traité n'avait modifié la situation existante en 1955, il me reste alors à examiner le comportement des Parties.

2. Monsieur le Président, Messieurs les juges, j'en viens donc maintenant au deuxième aspect, à savoir le comportement des Parties. En toute franchise, j'avais pensé que ma plaidoirie du vendredi 18 juin était parfaitement simple même si, bien entendu, elle pouvait prêter à contestation. Or, en écoutant les représentants du Gouvernement du Tchad vendredi dernier, j'ai été surpris de constater combien leurs arguments étaient peu juridiques. Nous avons tous eu droit à un véritable feu d'artifice qui n'avait rien à faire avec le différend territorial porté devant la Cour et de l'autre côté de la barre on a préféré se cacher derrière la fumée provoquée par ce feu que d'affronter le véritable problème. Le professeur Sorel a commencé en affirmant, pour la première fois, et contre toute vraisemblance, que le traité du 15 juin 1980 fut : "Signé du côté tchadien par un membre d'une des factions rivales et que celui-ci n'exerçait aucune fonction gouvernementale officielle." (CR 93/25, p. 83.)

Si j'examine la plaidoirie du professeur Higgins, je dois constater qu'une bonne partie de celle-ci n'a rien à voir avec notre différend. En effet, quel peut être l'intérêt pour la Cour de la rupture des relations diplomatiques entre le Tchad et l'Allemagne, la prise en otage de plusieurs personnes, la lutte entre les diverses factions tchadiennes qui se disputent le pouvoir, les allusions aux îles Falkland-Malouines ou au Koweït. Quant au professeur Franck, il nous a donné une excellente leçon universitaire sur la valeur du principe de l'*uti possidetis* et sur celui du respect de l'intégrité territoriale des Etats, principes que la Libye n'a jamais contestés. Tout cela s'accompagne d'une description apocalyptique de la situation au Tchad où les gouvernements changent

constamment, soumis comme ils sont à des interventions militaires de la Libye, le vilain voisin du nord.

Monsieur le Président, loin de moi d'ironiser sur les malheurs du Tchad, qui ont été bien réels et que nous déplorons tous. Mais ces malheurs ne lui permettent pas de ne pas assumer ses actions comme ses omissions, ni de se retrancher derrière une fausse description de la situation sur le terrain, tout particulièrement derrière une confusion chronologique évidente.

Monsieur le Président, Messieurs les juges, revenons sur le terrain purement juridique, revenons sur terre ou plutôt sur le sable et voyons de manière plus concrète le problème qui nous oppose à nos collègues de l'autre côté de la barre.

J'examinerai d'abord la question du comportement des Etats en premier lieu au cours de la période qui va de 1956 à 1970. C'est une période calme. La France, présente jusqu'en 1960, disparaît formellement mais non en substance, jusqu'en 1965.

Je verrai ensuite le comportement de la Libye et du Tchad de 1971 à 1983; enfin leurs positions au sein de l'ONU et de l'OUA.

De l'autre côté de la barre, on reproche à la Libye son inaction au cours de la période 1955-1970. Cela n'est que partiellement exact. On se souvient, en effet, qu'au moment des négociations du traité de 1956, l'expert qui assistait la Libye avait proposé que l'on délimite l'ensemble de la frontière.

> "To facilitate everybody's task we should make a general review of the frontier as a whole, followed by a discussion of the Ghat-Ghadamès issue afterwards."
> (Contre-mémoire de la Libye, annexe 9.)

Cette proposition fut rejetée par les Français.

Alors que devait faire la Libye par la suite ? Elle est consciente d'une présence française dans la région, mais en l'absence d'une délimitation de la frontière, elle n'a guère d'éléments pour protester. D'ailleurs la période s'y prête mal (c'est la période de la guerre d'Algérie) et la France ne s'est guère montrée accommodante avec la Libye, sa réticence à évacuer le Fezzan, malgré le traité de 1955, en est la preuve. Il fallait donc attendre des jours meilleurs.

Ces jours meilleurs surgiront-ils après l'indépendance du Tchad ? On peut en douter. De

l'aveu même du Tchad :

> "Après la proclamation de l'indépendance du Tchad le BET est resté, jusqu'en 1965, sous l'administration d'officiers français. Cette situation résultait d'accord de défense et d'assistance technique et militaire signé par le Tchad et la France en août 1960." (Mémoire du Tchad, p. 303.)

Il est vrai, dit le Tchad, que dans leur fonction administrative les troupes françaises agissaient pour le compte du Tchad. Nous n'en doutons pas, mais il n'en reste pas moins vrai que pour l'administration libyenne, peu à même d'apprécier les subtilités juridiques, la situation n'avait apparemment pas changée, ce qu'elle voyait, comme l'a dit le professeur Sorel, était la "continuité des hommes" (CR 93/25, p. 71). Ce n'est d'ailleurs pas par hasard que la plupart des actes qu'il a indiqué comme étant des effectivités tchadiennes sont antérieurs à 1966.

En définitive, c'est après le départ des Français qu'un dialogue commence à se nouer entre la Libye et le Tchad. Sans doute, ces deux Etats auraient pu commencer à négocier la délimitation de leur frontière, mais il est probable que le Tchad ne connaissait pas mieux le dossier juridique que la Libye.

Ce traité de 1966 montre en tous les cas, nous l'avons vu, que le Tchad ne revendiquait pas la ligne découlant du traité de 1919, autrement le contenu de cette convention ne s'explique pas.

Ainsi Messieurs, tant que les Français sont là, la Libye se tait. Elle a bien tendu la perche à la France pour une négociation, celle-ci ayant été refusée, elle commencera à nouer le dialogue avec le Tchad en concluant un accord de coopération dans une vaste zone, dans l'attente d'une délimitation précise.

Monsieur le Président, Messieurs les juges, bien que de l'autre côté de la barre, on se soit efforcé de monter en épingle l'attitude de la Libye au moment de l'accession du Tchad à l'indépendance et lors de la déclaration des chefs d'Etat au Caire en 1964 en noyant le tout dans une sauce baptisée par le professeur Franck "les nouvelles règles de décolonisation", je pourrai être bref car l'attitude libyenne est toute simple et ne contredit aucune règle de droit international. D'après le Tchad, lors de l'admission du Tchad aux Nations Unies, la Libye aurait dû formuler des réserves, alors que son approbation chaleureuse montre que cet Etat n'avait pas de problème frontalier.

Toujours d'après le Tchad, la Libye en effet, devait être consciente des règles "nouvelles" de

l'*uti possidetis* et du respect de l'intégrité territoriale des Etats. Nous le savons bien, ces règles ne sont pas nouvelles, mais en tous les cas, elles n'ont strictement rien à voir avec notre problème, celui de la prétendue inaction de la Libye face à cette situation. Le professeur Crawford reviendra sur ses principes. Quant à l'attitude de la Libye, la Partie adverse, tout en citant des cas où des Etats ont indiqué leurs revendications territoriales au moment de l'indépendance d'autres Etats (CR 93/25, p. 65-66), la Partie adverse, dis-je, a été dans l'incapacité de nous prouver qu'une telle pratique s'était transformée en règle coutumière. Nous l'avons dit dans nos écritures (mémoire du Tchad, p. 384), le silence du Burkina Faso et du Mali lors de leur indépendance ne les a pas empêché de porter leur différend territorial devant la Cour en 1986.

Il en est de même en ce qui concerne la déclaration des chefs d'Etat africains de 1964. D'après celle-ci, la conférence : "déclare solennellement que tous les membres s'engagent à respecter des frontières existant au moment où ils ont accédé à l'indépendance."

Il s'agissait de l'affirmation d'un principe général d'une importance considérable pour l'Afrique. Pour quelle raison donc la Libye aurait du voter contre ? En invoquant une absence de frontière avec le Tchad ? Mais on lui aurait répondu que la déclaration se référait aux "frontière existant au moment où ils ont accédé à l'indépendance" et non pas à des frontières fantomatiques. D'autres voisins ayant des problèmes frontaliers ont d'ailleurs voté en faveur de cette déclaration, je citerai à nouveau le Burkina Faso et le Mali.

Monsieur le Président, Messieurs les juges, cette parenthèse refermée, revenons aux relations Libye-Tchad après le traité de 1966. On le sait, en mars 1968, le Gouvernement tchadien a été à évacuer définitivement la bande d'Aouzou à la suite d'une révolte de ses gardes nomades. La Partie adverse, et cela mérite d'être souligné, puisque par la suite, d'après elle, tous les maux tchadiens proviennent de la Libye, la Partie adverse n'impute pas à la Libye ce qui se passe en 1968.

Je ne pense pas qu'il soit nécessaire de revenir sur ce qui s'est passé en 1971, cette carte routière publiée et distribuée en Italie apparaît de peu d'importance, *je maintiens*, sans y revenir, ce que j'ai dit dans ma deuxième plaidoirie (CR 93/18, p. 33-34).

J'aurais préféré ne pas revenir sur la lettre de Tombalbaye, elle ne méritait pas que M. Pellet y

consacre toute une plaidoirie, avec le talent qu'on lui connaît. La Libye a donné à cette lettre une importance toute relative. Je m'étais efforcé, dans ma deuxième plaidoirie, de vous montrer que l'existence de cette lettre était vraisemblable puisqu'elle s'insinérait parfaitement dans la suite des événements. Nous n'avons pas, Messieurs, basé sur cette lettre notre thèse sur l'acquiescement. Cela dit, puisqu'il faut répondre, je tiens à dire tout d'abord que c'est le Tchad et pas la Libye qui a indiqué dès le début devant la Cour l'existence de cette lettre.

Ensuite, il est certain que des rumeurs anciennes ont montré que cette lettre de Tombalbaye aurait existé (Bernard Lanne, *Tchad Libye*. La querelle des frontières, 1982, p. 228-231 et *Jeune Afrique* du 11 septembre 1989).

Tout cela est incertain, nous somme d'accord, mais par contre je ne peux plus suivre, à mon grand regret, le professeur Pellet lorsqu'il nous dit que même si l'on admettait, pour les seuls besoins de la démonstration que cette lettre ait existé, elle n'aurait aucune valeur probante (CR 93/26, p. 35).

Pourquoi ? Parce qu'elle n'était pas publique. Le professeur Pellet cite à l'appui la déclaration française dans le cadre de l'affaire des *Essais nucléaires* devant votre Cour.

La situation n'est absolument pas comparable, la Cour, analysant cette déclaration a montré "Un engagement de cette nature, exprimé publiquement et dans l'intention de se lier, même hors du cadre de négociations internationales, a un effet obligatoire" (*C.I.J. Recueil 1974*, p. 267, par. 43) et la Cour ajoute plus loin que la déclaration unilatérale française a été faite *erga omnes* (*ibid.*, p. 269, par. 50).

En d'autres termes, la déclaration française, pour déployer ses effets ne peut que s'adresser à la communauté internationale tout entière. La lettre de Tombalbaye ne poursuit pas ce but et la communauté internationale ne lui demande rien.

Quant à la déclaration Ihlen, elle a sans doute été rendue publique par la suite mais la Cour n' a pas fait de cette publicité une condition de sa validité. Cette déclaration nous fait songer d'ailleurs à la lettre de Tombalbaye. Dans les deux cas il n'y a pas de cession de territoire mais plutôt renonciation des éventuels droits que ces gouvernements croyaient pouvoir posséder l'un sur le Groënland l'autre sur la bande d'Aouzou.

Si un ministre des affaires étrangères peut engager son Etat dans une affaire qui est de son ressort, à fortiori un tel engagement peut être aussi le fait d'un chef d'Etat.

Je l'ai dit, l'existence de cette lettre est plausible car elle permet de mieux comprendre la suite des événements. Au surplus, l'objet de cette lettre va bien-au delà du problème qui nous occupe puisqu'elle annonce au colonel Kadhafi que le Tchad a rompu ses relations diplomatiques avec Israël, et cela c'est un fait.

C'est donc à partir de 1971 que la Libye commence à manifester une certaine présence dans la bande d'Aouzou. Je suis entièrement d'accord avec l'affirmation de nos contradicteurs d'après laquelle en décembre 1972 on ne mentionne pas la bande d'Aouzou. Ainsi, lors de la réunion entre les deux délégations, en décembre 1972, l'agence tchadienne de presse indiquait :

> "Cette séance de travail a été utile dans la mesure où elle a permis à chacune des délégations d'exposer franchement et clairement son point de vue et il semble que tout se déroule dans une très bonne ambiance et qui permet d'heureux résultats." (République du Tchad, annexe 157, p. 2.)

L'on sait que cette réunion donnera lieu à la conclusion du traité d'amitié et de coopération. Mais cet accord est-il vraisemblable, Monsieur le Président, si entre temps les Libyens se trouvent illégalement à Aouzou ?

Embarrassés sans doute par l'attitude tchadienne à l'égard de la Libye au cours des années suivantes, les conseils du Gouvernement tchadien soutiennent que le Tchad a été victime d'une agression, que la Libye s'est emparée par la force de la bande d'Aouzou. D'après le professeur Sorel cette "invasion armée" s'est produite en 1973 (CR 93/25, p. 76).

Monsieur le Président, l'accusation est grave, l'agression est grave, l'agression est depuis longtemps retenue comme la violation d'une norme internationale de la plus grande importance. Or, il n'y a pas d'exemple dans la pratique internationale d'une victime d'une agression qui n'ait pas élevé des protestations, ni porté plainte devant le Conseil de sécurité. C'est là une réaction instinctive qui ne souffre pas de délais.

Le Tchad ne fait rien de tout cela, il se tait. Par "prudence" nous dit-on de l'autre côté de la barre. Messieurs, il n'y a pas de prudence qui tienne lorsque l'on est victime d'une agression. La vérité est qu'il n'y a pas eu d'agression, que celle-ci n'existe que dans l'imagination de nos

contradicteurs. Et s'il n'y a pas d'agression c'est parce que la bande d'Aouzou est considérée par le Tchad comme libyenne.

Mais cette absence de réaction ne suffit pas, je vous l'ai déjà signalé, le communiqué tchado-libyen du 7 mars 1974 lors de la visite du colonel Kadhafi à Fort-Lamy déclare :

> "Le Président N'Gorta Tombalbaye a tenu à remercier son collègue libyen et le peuple de Libye pour l'aide efficace qu'ils apportent pour le développement du Tchad."

En vérité, c'est pousser la prudence un peu plus loin que de remercier publiquement l'Etat qui vous a agressé.

Les relations entre les deux Etats sont tellement bonnes que, toujours en 1974, ils signent au cours de cette année plusieurs protocoles d'accord en vue d'une création de sociétés mixtes dans les domaines de l'agriculture, de la pêche, de l'infrastructure dans le secteur de l'élevage, dans la production et le commerce du bétail (réplique du Tchad, annexe 162). Enfin, on s'en souvient, c'est le 12 août 1974 qu'est signé le traité qui souligne les liens historiques qui unissent ces deux peuples frères.

On nous dit alors qu'il fallait interpréter les traités en tenant compte du contexte historique, et je n'ai pas d'objection sur ce point. Comme on peut le constater à l'occasion le contexte historique entre les deux Etats montre que leurs relations sont dans l'ensemble amicales.

De toute manière, nos collègues de l'autre côté de la barre, qui insistent à tout propos sur l'importance du texte, ne contesteront pas que le texte d'un traité doit primer sur le contexte historique, or ce texte parle de deux peuples frères.

C'est donc vers la moitié de l'année 1977 et au début 1978 que le Tchad, comme nous le savons, saisira l'OUA et l'ONU. Il aura fallu quatre ans au Tchad pour réaliser qu'il a fait l'objet d'une agression et que la Libye se trouve illégalement à Aouzou ! J'examinerai ces plaintes plus loin, retenons simplement ici qu'il ne s'agit que d'une parenthèse. Le Conseil de sécurité ne tiendra qu'une seule séance. Les deux Etats rétablissent leurs relations diplomatiques et tout reprend comme avant.

J'en arrive donc à ce fameux traité de 1980 qui, vous vous en souviendrez, Messieurs de la Cour, interdisait l'installation de bases militaires étrangères au Tchad. J'en avais déduit, je pense logiquement, qu'une telle disposition montrait que pour les Tchadiens, Aouzou ne faisait pas partie

du Tchad, autrement cette disposition était incompréhensible, puisque la Libye se trouvait dans cette zone.

La Partie adverse ne répond pas sur ce point, elle préfère expliquer ce traité par deux affirmations vraiment extraordinaires qui ne correspondent pas à la réalité. D'après le professeur Sorel, je l'ai dit, "le traité fut signé du côté tchadien par un membre d'une des factions rivales, et que celui-ci n'exerçait aucune fonction gouvernementale" (CR 93/25, p. 83). Si cette affirmation était exacte, le Tchad l'aurait signalé depuis longtemps, invoqué sa nullité, or c'est la première fois que cet argument apparaît et ce traité fut enregistré au Secrétariat des Nations Unies en octobre 1980.

De son côté le professeur Higgins nous dit au sujet du même traité : "Chad was under military occupation when that Agreement was signed. And the same was true of the Treaty of 1981." (CR 93/26, p. 23.)

Je ne vois pas très bien la conséquence juridique que l'on veut tirer de l'autre côté de la barre de cette affirmation. De toute manière, Messieurs, elle est totalement erronée.

En ce qui concerne le traité de 1980, il est du 15 juin. Or les troupes françaises ont terminé leur évacuation du territoire tchadien le 16 mai 1980 (je ne pense pas que le professeur Higgins se référait à elles), et ce n'est qu'en octobre que les troupes libyennes interviennent. En réalité donc, le traité de 1980 est conclu dans une des rares périodes où il n'y a pas de troupes étrangères au Tchad.

Au surplus, on semble l'oublier, et cela concerne le traité de 1981, les troupes libyennes se trouvent au Tchad à l'appel des autorités de cet Etat. Si cela constitue une occupation militaire, que dire alors des interventions militaires françaises qui se sont déroulées dans les mêmes conditions ? On peut tout de suite tenir pour non avenues les belles effectivités tchadiennes de la période qui va de 1960 à 1965 et qui nous ont été décrites avec force détails par le professeur Sorel.

Messieurs de la Cour, le but poursuivi par nos deux contradicteurs, à travers leurs affirmations, m'échappe, car il est indubitable que le GUNT constituait en 1980 et en 1981 le Gouvernement légitime du Tchad. C'est lui qui est représenté auprès des Nations Unies et l'OUA ne conteste pas sa légitimité. Il suffit pour cette dernière de se référer à sa résolution de Nairobi du 27 juin 1987 (AEG/Res. XVIII/Rev. 1).

D'ailleurs le professeur Cot, à l'époque ministre français de la coopération, écrivait : "nous pensons que le président Goukouni, loin d'être une marionnette de Tripoli, incarne une certaine volonté nationale tchadienne" (J. P. Cot, *A l'épreuve du pouvoir*, Paris, p. 146).

Je tiens à formuler cette affirmation pour éviter toute équivoque.

Monsieur le Président, Messieurs les juges, il ne vous aura pas échappé que les plaidoiries de la Partie adverse sur ce point des relations entre la Libye et le Tchad, en cumulant les inexactitudes, les diversions sans rapport avec notre sujet, les effets d'atmosphère, ces plaidoiries, disais-je, poursuivent un seul but : ne pas répondre à l'argument développé dans ma deuxième plaidoirie, à savoir que dans la période qui va de 1971 à 1983 (et hormis l'interruption de 1977-1978), le Tchad a, par son silence et par son comportement actif, renoncé aux droits bien incertains qu'il pouvait penser posséder dans la région. Toute l'histoire de leur relation le montre.

S'agissant d'une réplique, et le temps à notre disposition étant fort limité, je crois inutile de revenir sur l'analyse faite de la jurisprudence internationale relative à l'acquiescement et cela d'autant plus que la Partie adverse ne l'a pas critiquée. *Je maintiens donc intégralement ce que j'ai dit à ce sujet lors de ma plaidoirie du vendredi 18 juin.*

Il est vrai comme on l'a fait observer, qu'une occupation militaire ne donne à la puissance occupante aucun droit territorial, mais je crois avoir démontré que justement il n'y a pas eu agression ni occupation militaire. J'ajouterai qu'en l'absence d'une délimitation de frontière entre la Libye et le Tchad, ce dernier se devait de réagir face à la présence libyenne dans la bande d'Aouzou.

J'en viens donc maintenant très brièvement *à l'attitude des Parties devant l'ONU et l'OUA.* Ici, aussi, la Partie adverse semble soutenir que le Tchad a multiplié les recours et qu'il a exposé devant ces organisations sa position juridique de manière exhaustive et rigoureuse. D'après le professeur Franck :

> "The Libyan invasion of the BET in 1973 was protested very vigorously by Chad; after bilateral negotiations with, and appeals to Tripoli proved of no avail, Chad then took its case to the United Nations Security Council and the General Assembly, as well as to the Organization of African Unity." (CR 93/26, p. 40.)

La réalité est bien différente, Messieurs, les négociations bilatérales, on l'a vu, portent plutôt sur la collaboration amicale entre les deux Etats; quant à la protestation vigoureuse, elle interviendra

en 1977, soit quatre ans après la prétendue invasion de la région concernée.

En 1977, devant l'Assemblée générale, le Tchad dénonce l'occupation militaire de la bande d'Aouzou et fait état, sans aucune preuve ni aucune précision, de nombreuses négociations entre les deux Parties. De plus, il ne développe aucun argument juridique à l'appui de sa dénonciation. Quant au délégué libyen, rejetant les allégations d'ingérence dans les affaires intérieures du Tchad, il se référait à la carte des Nations Unies de 1952, jointe au rapport Pelt.

Dans sa plainte auprès du Conseil de sécurité, en février 1978, le Tchad mettra surtout l'accent sur le prétendu appui fourni par la Libye aux rebelles tchadiens. Il souligne aussi que la Libye n'a fourni aucun dossier pour justifier des prétentions sur Aouzou. Devant le Conseil de sécurité, le représentant du Tchad a sans doute commencé à justifier les prétentions de cet Etat dans la région, en se référant notamment au traité de 1955 (Nations Unies, *Procès-verbaux officiels du Conseil de sécurité*, 2060e séance, 17 février 1978, p. 2).

Quant au délégué de la Libye, il réaffirmera le caractère libyen de la bande d'Aouzou : "Le représentant du Tchad nous a accusés d'avoir occupé Aouzou en 1973, mais ce n'est pas vrai, nous n'avons rien occupé." (*Ibid.*, p. 9.)

Evidemment, Monsieur le Président, Messieurs les juges, on n'occupe pas un territoire qui vous appartient. Mais, nous ne l'avons pas nié, il est certain que la Libye, tout en précisant qu'elle est dans son droit, n'appuie pas sa thèse sur une argumentation juridique. Cela dit, toute cette affaire ne devait pas être si grave puisque le Tchad retire sa plainte auprès du Conseil de sécurité quelques jours après l'avoir introduite.

On n'entendra plus parler de toute cette question que cinq ans après, en 1983. Si, comme le prétendent nos amis de l'autre côté de la barre, le Tchad était soumis à une agression permanente de la part de la Libye, le délai est plutôt long. Le Tchad est si peu soumis à cette agression que son délégué à l'Assemblée générale des Nations Unies en 1981 dira :

> "Certains pays amis n'ont pas attendu l'appel des Nations Unies et de l'OUA pour venir en aide au Tchad. Nous voulons surtout parler de la Jamahiriya arabe libyenne qui a apporté une aide matérielle et financière non négligeable pour la reconstruction du Tchad ... que ces pays frères veuillent trouver ici l'expression de notre profonde gratitude." (Nations Unies, *Documents officiels de l'Assemblée générale, trente-sixième session*, séance plénière, 7 octobre 1981, p. 581.)

J'ai d'ailleurs indiqué dans ma deuxième plaidoirie, que M. Goukouni Oueddei avait déjà, en 1980, exprimé cette gratitude lors d'un voyage à Tripoli.

En définitive, c'est en mars 1983 que le Tchad, saisissant à nouveau le Conseil de sécurité, déposera un mémorandum (DC S/15 649 du 22 mars 1983) dans lequel il précisera des thèses juridiques et l'on y retrouve une bonne partie, mais certainement pas la totalité, des arguments développés par le Tchad auprès de votre haute juridiction.

Il est vrai, et nous le nions pas, la Libye n'en fera pas autant. Quand même elle se réfère au traité franco-italien de 1935, il est vrai à tort.

Nous l'avons indiqué : 1) en 1955, la Libye était mal équipée pour connaître la subtilité du dossier qui est soumis à la Cour aujourd'hui; 2) le dossier, vous le savez, Messieurs, est d'une complexité extrême. Déjà, une note du Foreign Office du 21 juillet 1955, au moment de la négociation de ce traité, indiquait :

> "We are looking into the exact status of previous international agreements as a matter of urgency. It is an extremely complicated question." (Mémoire de la Libye, "Annexe : Archives britanniques", p. 335.)

En se référant au traité de 1935, la Libye a d'ailleurs des excuses : le professeur C[illegible] nous a montré que des cartes géographiques indiquaient encore la ligne découlant de ce traité. Le ministre français de la défense, Charles Hernu, confirmera la thèse libyenne en disant en 1985 : "La bande d'Aouzou est hors du Tchad. C'est une affaire qui remonte à 1934." (A. Bennessaoud Tredano, *Inangibilité des frontières coloniales et espace étatique en Afrique*, Paris, 1989, p. 176).

En définitive, ce n'est pas par hasard que le Tchad présente en 1983 devant les Nations Unies un dossier relativement cohérent. En effet, le 31 mars 1983, le délégué français devant le Conseil de sécurité dira :

> "Je voudrais ajouter une dernière précision : c'est que l'ensemble des documents que mon gouvernement possède au sujet du tracé de cette frontière ont été communiqués aussi bien au Gouvernement du Tchad qu'au Gouvernement libyen qui les connaît donc parfaitement."

Sans doute convient-il de saluer l'objectivité du représentant français sur ce point. Mais il n'en reste pas moins qu'un examen superficiel du dossier pouvait paraître favorable à la thèse tchadienne, qui en fera donc tout de suite état, alors que ce dossier ne pouvait être pour la Libye que le point de

départ d'une longue analyse qui ne donnera vraiment ses fruits que quatre ans plus tard devant l'OUA.

Les débats devant les Nations Unies qui suivent l'année 1983 n'ajoutent pas grand-chose à la dimension juridique de notre affaire, on en revient toujours aux prétendues interventions libyennes dans les affaires intérieures tchadiennes, la Libye soutiendra à diverses reprises que la bande d'Aouzou fait partie du territoire libyen.

Mais je voudrais tout de même souligner ce que M. Maghur a déjà indiqué : le Conseil de sécurité n'a jamais condamné la Libye pour agression mais il a renvoyé les Parties à un règlement pacifique des différends tout particulièrement à l'OUA.

Monsieur le Président, je n'ai pas grand chose à ajouter à ce que je vous avais indiqué lors de ma deuxième plaidoirie du vendredi 18 juin *au sujet de l'attitude des Parties devant l'OUA* et cela d'autant plus que mon collègue le professeur Bowett reviendra sur ce problème. Cette organisation est saisie par le Tchad, en juillet 1977, qui dénonce l'occupation par la Libye de la bande d'Aouzou. Il fonde son argumentation juridique sur le traité de 1955.

Nous savons qu'à la suite de cette plainte, la conférence des chefs d'Etat instituera un comité *ad hoc* qui, à son tour décidera, toujours en 1977, de nommer un sous-comité. En fait, l'OUA est préoccupée dans les années qui suivent 1) par la situation interne tchadienne, 2) par les difficiles relations entre la Libye et le Tchad. Ce n'est, en définitive, qu'en 1987 que ce sous-comité se penchera sérieusement sur le différend frontalier. On sait qu'il présentera deux rapports, un en 1987, l'autre en 1988, la différence entre les deux est que le dernier expose la thèse libyenne de manière plus approfondie; leur examen montre que le sous-comité s'est livré à une étude détaillée du différend territorial entre les deux Etats. Contrairement à la Partie adverse, il ne s'est aucunement limité à la question de la bande d'Aouzou et il n'aurait pu le faire d'ailleurs, la Libye et le Tchad ayant développé des arguments juridiques forts complets. De même, les rapports indiquent que la Libye n'a aucunement limité ses prétentions à la bande d'Aouzou. Enfin, contrairement à ce que le professeur Franck veut nous faire croire en disant : "The OUA would not have been sympathetic to the legal claims Libya now advances." (CR 93/26, p. 56), en réalité le sous-comité n'a pris position

en faveur des thèses d'aucune des parties et on sait, l'OUA recommendera aux deux Etats, en l'absence d'un règlement politique, de s'adresser à votre haute juridiction.

Monsieur le Président, Messieurs les juges, j'en viens maintenant à la conclusion de ma plaidoirie. Vous ne serez pas étonnés de constater qu'elle ne diffère guère de celle de ma plaidoirie du 18 juin.

1) En premier lieu, l'analyse des différents traités conclus entre la Libye et le Tchad montre qu'il n'y a pas eu de délimitation de la frontière entre les deux pays. Cela résulte tout particulièrement du traité de 1966. Si une frontière avait existé, les deux Parties n'auraient pas prévu une collaboration transfrontalière dans une région de 750 kilomètres.

2) En deuxième lieu, la présence libyenne dans la bande d'Aouzou n'est pas la conséquence d'un recours à la force et le Tchad, dans la période de 1971 à 1983, n'a protesté contre cette présence que du mois de juin 1977 à février 1978. Non seulement il y a eu silence de sa part mais il y a eu un comportement qui est en totale contradiction avec ce qu'il soutient aujourd'hui : aucun Etat ne signe quatre traités d'amitié avec un Etat qui est censé occuper une partie de votre territoire et je ne mentionne même pas les remerciements d'hommes politiques tchadiens à la Libye. La valeur juridique du comportement tchadien que je viens de vous décrire doit être appréciée à la lumière de la reconnaissance par les deux Parties d'une date critique se situant en 1951. Il en résulte que la conduite des Parties après cette date peut soit confirmer l'existence d'un titre juridique soit, au contraire, l'infirmer. J'estime que la présence libyenne dans la bande d'Aouzou, non contestée par le Tchad, vient confirmer, voire réaffirmer, le titre juridique libyen dans cette région.

3) En dernier lieu, la Libye a fait valoir devant l'OUA et devant l'ONU que la bande d'Aouzou faisait partie de son territoire. Il est vrai qu'au début la justification juridique invoquée sera succincte et même erronée mais, on l'a vu, le problème était complexe et ce n'est d'ailleurs qu'en 1983 que le Tchad lui-même a vraiment commencé à développer son argumentation. Plus tard, devant l'OUA, la Libye développera plus amplement sa thèse tant au point de vue des arguments juridiques que de ses prétentions qui rejoignent largement celles qui sont aujourd'hui avancées devant vous, Monsieur le Président, Messieurs les juges.

En vous exprimant ma profonde gratitude pour votre patiente attention, je vous serais bien reconnaissant, Monsieur le Président, de donner la parole demain matin au professeur Crawford. Merci.

Le PRESIDENT : Thank you very much, Professor Cahier. We will adjourn until 10 o'clock tomorrow morning.

L'audience est levée à 12 h 50.

CR 93/29

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1993

Public sitting

held on Thursday 8 July, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerningTerritorial Dispute
(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le le jeudi 8 juillet , à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial
(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajibola
	Herczegh
Judges *ad hoc*	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H. E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramadane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X — Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Cassese, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center for International Studies, New York University, School of Law,

Mr. Oliver Corten, Assistant at the Faculty of Law of the Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X — Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Parix X — Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel,
Mrs. Susan Hunt,
Miss FLorence Jovis,
Mrs. Mireille Jung,
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Mr. Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court.

A. Introduction: Chad's new position on original acquisition

1. In this part of the Libyan Reply it is proposed to focus on the legal issues which now divide the Parties to the "différend territorial", the dispute submitted to the Court. I say, the legal issues which now divide the Parties, because there has been a great deal of movement on the part of Chad in this regard. Professor Higgins complained, in her pleading of 30 June 1993 (CR 93/24, p. 25), of the "countless . . . iniquities" attributed to Chad in terms of its reliance on a colonial view of international law. Mr. President, each one of the propositions attributed to Chad in my argument of 21 June (CR 93/19, pp. 36 (para. 9), 37-88 (paras. 10-12), 39-40 (paras. 17-18), 46-48 (paras. 32-36), 50 (para. 42), 52-54 (paras. 48-52), 57 (para. 55)) was illustrated by precise reference to and brief quotation from Chad's pleadings. I deeply regret that my French is not good enough to have concocted those passages. In fact what Chad has done is to abandon its entire legal argument on the issue of original acquisition, as contained in its written pleadings, and to start anew. So it is no longer argued that spheres of influence are equivalent to territorial titles (although Professor Pellet still persisted in referring to Chad in 1902 as "une colonie virtuelle" (CR 93/23, p. 34)). It is no longer argued that the peoples of the region were outside the protection of the law of nations, and had no rights under international law. Nor is it any longer inferred that the borderlands were *terra nullius*. The Court will have noted that it took Chad three rounds of written argument and three days of oral argument, before it could be brought to make its position clear on this issue, to state explicitly that the borderlands were not *terra nullius*. Professor Shaw, whose speech referred to original title, might have been expected to tell us, but remained coy. It took Professor Higgins, in her robust way, finally to make the position clear (CR 93/24, p. 22).

2. Leaving behind the ruins of Chad's argument to date — rather as the French soldiers left behind the ruined library at Bir Alali — Chad starts again, in the pleading of Professor Higgins, to redefine its position on the acquisition of title. What does it say now?

B. The role of "occupation" of territory not *terra nullius*

3. Having accepted that the borderlands were not *terra nullius*, Professor Higgins went on to say that nonetheless a colonial power could acquire sovereignty by means other than agreement (CR 93/24, p. 32), by means she persisted in referring to as occupation, albeit forceful occupation. At this point her argument took on apocalyptic overtones. Not to confirm the 1919 boundary would, she said, bring into doubt most of the boundaries of Africa (CR 93/24, pp. 32-3). It would undermine the legitimacy of settler States everywhere in the world, in much of North America, and even — and Mr. President this was a particularly wounding blow — the whole of my own country, Australia (CR 93/24, p. 32). Of course Australia would be protected by Article 59. The Court could not have said, in what Professor Higgins called its *dictum* in the *Western Sahara* case, that is to say its express answer to an express question asked by the General Assembly, that occupation was only appropriate to *terra nullius* because, she said, that would bring juridical anarchy.

4. But the Court, in paragraph 79 of is Opinion, was quite clear in referring to *terra nullius* as a necessary prerequisite to occupation in the proper sense of the term. It said this not once but three times. Mr. President, in English we have a statement, a well-known quotation, "what I say to you three times is true". We all know that this is not necessarily the case. We have head Chad's argument repeatedly asserting propositions which Libya denies. But what I say to you three times must be deliberate. The idea that the Court did not mean what it said three times is rather unusual. I set out the relevant passages in my earlier pleading and I will not repeat them here (CR 93/19, p. 41). Professor Higgins in effect accused the Court of legislating retrospectively, of overturning the actual expectations of those involved at the time. But the idea that occupation was appropriate, and only appropriate, as a method of acquisition of *terra nullius* was well accepted in the State practice of the period. I quote, for example, a British statement in 1839 in relation to New Zealand, when it was said that an assumption of sovereignty was "strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation with, and free concurrence of, the native chiefs" (*Correspondence relative to New Zealand*, 1840 No. 11, pp. 68-9). And this idea goes back to Victoria, who had said that

> "the aborigines undoubtedly had true dominion in both public and private matters, and . . . neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners" (*De Indis*, Vol. 1, proposition 24 (1532).

This was published in 1532. This is the doctrine that Professor Higgins treated as a dangerous heresy, an innovation, an *ex post facto* invention by this Court in 1975, and that evoked from her such cries of alarm.

5. Her argumentative technique involved not merely threats of the apocalypse: it also involved studied inattention to what the Court, and Libya, actually said. The Court in *Western Sahara* referred to occupied territory being acquired by "cession or succession". *I.C.J. Reports 1975*, p. 12 at p. 39 (para. 79)). It was not necessary for the Court to specify what was involved in the concept of succession, since Spain had made treaties with the tribes. But one can infer that succession would involve a number of other possibilities, and these were explicitly canvassed in my speech and that of Professor Bowett in the first round (CR 93/19, pp. 64, 65-66; CR 93/20, pp. 10-19). One such possibility is *debellatio*, complete suppression of the State. A non-State entity with rights over its own land recognized under international law must be entitled to protection. But not to more protection than would be accorded to the State itself. So *debellatio* would apply. Another possibility might be conquest, if one admits conquest as a separate means of acquiring title — I will return to that issue shortly. And then there is the possibility of consolidation, that is to say, general acceptance of a situation which, whatever its origins may have been, has been generally recognized and accepted. Professor Bowett carefully dealt with that possibility earlier (CR 93/20, pp. 14-19). So there is no apocalypse, and no juridical anarchy. And Chad's angry insistence on the possibility of military occupation of an already occupied territory — so that is what Professor Higgins' new theory amounted to (CR 93/24, pp. 32-3) — is left without a juridical basis.

6. Perhaps Chad now argues that title could have been acquired by forceful occupation in relation to a group that did not have title. This appears to be its case with regard to the French use of force against the Senoussi. Professor Higgins said "Conquest . . . does not seem to describe the occupation of the BET, when military activity was directed against the Senoussi and others who did not have international title" (CR 93/24, p. 38). But this is tantamount to saying the territory was *terra nullius*, which Chad now denies. And no distinction can be made between the Senoussi and the

local tribes, not only because the tribes were Senoussi but also because France fought against them as well, and in conjunction with the Brotherhood. So either the territory was *terra nullius*, which both Chad and Libya deny, or the proposition has no relevance in the present case.

7. Mr. President, it might be asked what is the function of the traditional rules relating to the acquisition of title, if in addition to cession one admits the other possibilities to which I have referred. In the end the superior power could prevail, so what was the point of making these distinctions? The answer is that the rights and interests of other legal persons might be involved, and they could insist on the observance of international law requirements, and on the legal consequences which would flow from the transactions, for example in terms of succession or compliance with treaty commitments.

8. And the point is that the Ottoman Empire, and subsequently Italy, were involved, did assert their successive rights. So for that matter did the Senoussi, in a series of transactions before and after 1912, a series of transactions that had at the very least the appearance of international transactions, and in the spirit of the Court in the *Western Sahara* one would say also the reality. The involvement of Italy provides yet another reason for dismissing Professor Higgins' vision of the apocalypse. She complained that Libya's argument based on the impossibility of French acquisition of Italian title after 1912 was a new argument (CR 93/24 p. 41). It is of course fully developed in Libya's pleadings (see e.g., RL, pp. 225-227, 252-255 with references to earlier pleadings). It means that, at one level, at least, the dispute between France and Italy after 1912 was just another in the long list of disputes over title to territory. Of course, at another level it did involve the Senoussi tribes as belligerent, but that can hardly be thought to *improve* Chad's case.

C. The legal status of spheres of influence

9. I pass then to the legal status of spheres of influence. In relation to that issue, the running was taken up by Professor Pellet. He retreated, it is true, from the earlier suggestions of spheres of influence as themselves involving or producing juridical titles (CR 93/23, p. 18). They were now not juridical but merely potential, as Libya has always asserted.

10. But he sought to insist that the so-called Italian recognition of the French zone in 1902

must have involved the legal consequence that Italy did not acquire territory within that zone by the Treaty of Ouchy in 1912. Otherwise, he said, spheres of influence agreements would have no meaning or substance (CR 93/23, p. 25). But as I have already pointed out, it cannot be assumed that spheres of influence agreements had any legal meaning or substance, other than on a purely bilateral basis as treaties between the parties (CR 93/19, pp. 46-52). They did not bind the territorial sovereign, who in every case was not a party to them. The territorial sovereignty of the Ottoman Empire was not controlled or limited by sphere of influence agreements concluded between third States. Such agreements were *res inter alios acta* so far as the territorial sovereign was concerned. The point can be put another way, by analogy from the law of State succession. In the standard case of succession, a bilateral treaty is not succeeded to unless it either establishes a boundary or relates to the régime of a boundary. It could not possibly be argued that a sphere of influence agreement related to the regime of a boundary, in this sense. International law is perfectly familiar with the distinction between status and contract, in its terms between title and treaty. Although the application of that distinction in the case of major multilateral treaties can produce difficulties, no-one has ever suggested that bilateral treaties prevail over territorial title. And it follows from that elementary distinction that, as bilateral treaties, sphere of influence agreements would not prevail over territorial rights already existing or subsequently acquired. If I promise my wife not to buy an expensive car, that does not stop me from acquiring title to a car that I subsequently buy, even though in doing so I break the promise to my wife. The same thing would be true about a promise to a bank manager, although the remedy might be different. Similarly, even if it is accepted, for the purpose of the argument, that Italy recognized a French sphere of influence to the south of Tripolitania, as marked on the map, that would not stop Italy acquiring title in that area from a third State, as it did under the Treaty of Ouchy. Of course, the assumptions of the Chad argument are also unfounded: Italy did not recognize any French zone in 1902, as Mr. Sohier has amply demonstrated.

D. Shared sovereignty and the Senoussi

Mr. President, I now move to the subject of shared sovereignty and the Senoussi.

11. Professor Shaw, dealing with the legal test for the acquisition of sovereignty over the borderlands, did not diverge to any great extent from the analysis of that issue presented by Libya in the first round (CR 93/24, pp. 14-15). In particular he did not seek to maintain the wholly erroneous analysis of the issue of Moroccan sovereignty in the *Western Sahara* case, that was contained in Chad's written pleadings (CR 93/19, pp. 55-8). He did, it is true, misstate and misapply the law to the facts of our case, as Professor Dolzer will shortly demonstrate. But for present purposes his remarks call only for a few observations.

12. The first point, which is applicable equally to Professor Cassese, relates to the problem of double standards. Professor Cassese was eloquent about the nature of the terrain, the importance of oases and of control over caravan routes (CR 93/24, pp. 46-7). He concluded that it was possible to control the borderlands with a comparatively few men and very limited resources, and that the French had done so within a short time of the Ottoman departure, despite the bitter hostility of the tribes (CR 93/24, p. 49). But there is no trace in Chad's presentation of any acceptance of the same standards in relation to the Ottomans. According to Chad, the Ottomans could not establish their sovereignty, despite substantial prior involvement in the region, a long-standing and well-known claim to it, the support of the people and the Senoussi Brotherhood, a substantial civilian and military presence in the period of direct rule from 1908-1913, and control over the oases and the caravan routes (CR 93/23, pp. 78-82). Their claim was precarious, ephemeral. By contrast, according to Chad, within months, or at worst a year or two, France had securely established its sovereignty, despite the bitter opposition of the people, no prior legal entitlement or presence, and no civilian administration of any kind. This is a purely self-serving argument. Moreover it suggests that Chad is still really treating the position as involving an occupation of *terra nullius*. Only over *terra nullius* could sovereignty be so rapidly and readily established: in the case of a bitterly contested military occupation, much more would be required. And as Professor Bowett will again show in the discussion of French *effectivités* after 1913, that was not forthcoming.

13. The same unbalanced and unilateral assessment can be seen in relation to the hinterland issue. On either side of Libya were territories to which a vast hinterland was claimed and

recognized. In the case of Egypt, this extended to Nubia, Darfour, Kordofan and Sennar, as indicated in the Ottoman *firman* of 13 February 1841. In the case of France it extended down to the Say-Barroua line, as recognized by Britain in 1890. And yet when it comes to any Ottoman claim, Chad goes so far as to deny the existence of the doctrine. It was uncertain (CR 93/24, p. 10), it gave no rights (*idem*, p. 11); its status was "controversial at best" (*ibid.*). No doubt, as I indicated in my earlier presentation, the hinterland doctrine was not an independent basis of title. But in the case of the Ottoman Empire the claim was publicly made as a claim to sovereignty, and it co-existed with social and religious links with the people of the area. All this Chad ignores — another indication of double standards.

14. Professor Shaw seemed to be perplexed generally, Mr. President. He professed not to understand the idea of joint title, or of a sharing of the competences of sovereignty, except in the distinct context of federalism or condominium. In the absence of some formal constitutional arrangement or treaty, sovereignty could not, he seemed to think, be shared (CR 93/23, p. 74). In his view, any claim to sharing "really" amounted to a claim of a federation or a condominium (*ibid.*), or at best a "protectorate" (*id.*, p. 76), which again required, and I quote: "the formal division of the attributes and exercise of sovereignty". Professor Shaw seemed to dwell in a heaven of territorial concepts, an international law of artificial categories, as if it is necessary for political arrangements to be forced into a fixed number of predetermined types. This was curious to hear, coming from a British public lawyer, and given the notorious reluctance of British law to classify its own constitutional arrangements. His was the system that developed such mysterious legal constructs as the Isle of Man, the older dominions, British nationality under the 1948 Act, special treaty relations with the Emirates of the Gulf. His is the system which is now grappling, in its own distinctive way, with the European Community, and making special arrangements for the Government of Hong Kong and even of Northern Ireland. Yet according to Professor Shaw, we are reduced to a meagre *menu fixe* consisting of federation, condominium, and protectorate for dessert. On the subject of protectorates, the Foreign Jurisdiction Act 1890 (UK), under which all British protectorates were governed, envisaged that jurisdiction could be acquired not only by treaty but also by "grant, usage,

sufferance or other . . . means". And that indeed happened. The British experience, while rich, was not unusual: arrangements for the government of territory have always been diverse. The function of lawyers is not to force these arrangements into a few narrow categories, as Professor Shaw sought to do.

15. Mr. President, I will not repeat here what I said in the first round on the question of the analysis of entities in which governmental powers are concurrently exercised at different levels (CR 93/19, pp. 60-1). I cited the case of *Lighthouses in Crete and Samos (1937, P. C. I. J., Series A/B, No. 71)* not because we are dealing here with the gradual separation of part of the Ottoman Empire, but because it represents one way of undertaking that analysis. The point I was making, and that Chad has failed to address, is that either one treats the unit within which powers are shared in accordance with some notion of partnership or shared sovereignty, or else one looks at the various powers as contributing to the constitution of the entity as a whole. Chad's argument is a form of analysis for the purpose of dismemberment, the strategy, I repeat, of divide and conquer. Of course, there is a question whether the Ottoman Empire as a unit included the borderlands in 1912, and Professor Dolzer will deal with Chad's factual arguments on that question shortly.

16. A further point, Mr. President, Members of the Court, relates to the situation once sovereignty, shared or unitary, has been established. On this point I am pleased to report our complete agreement with what was said by Professor Higgins. She said that: "the loss of title by a State over part of its territory, under international law, is effected not by a paucity of *effectivités* . . . but by cession or by the clearest withdrawal of all exercises of sovereignty by that State, coupled with an intention to abandon its title" (CR 93/26, p. 24). It is true that Professor Higgins only said that once, but we can assume that she meant it. And she went on to refer to the dispute over the Falkland Islands, and to the substantial international support Argentina has had for its underlying claim in that case (*idem*, p. 28). Mr. President, one can imagine hearing Professor Cassese eloquent on the *effectivités* of the United Kingdom over the Falkland Islands since 1833. But as Professor Higgins points out, that is not the issue, once it is established that Italy acquired sovereignty over the borderlands by succession to the Ottoman Empire, and made its protests at subsequent French

effectivités.

E. Conquest as a root of title

17. That brings me naturally to the question of French conquest as a root of title to the borderlands in the period after 1913. As I have already noted, Professor Higgins complained at the imaginary argument that required "peaceful cession" to bring about a transfer of territory which was not *terra nullius*. According to Chad, before 1919 (in the case of League members), before 1928 (in the case of States generally), before 1945 (in the case of non-State entities occupying their own territory), war was lawful and conquest consequently was an available mode of acquisition (CR 93/24, pp. 40-42).

18. Now in one respect, at least so far as the position before 1919 is concerned, Professor Higgins is undoubtedly right. I have already referred to the case of *debellatio*, the complete subjugation of a State or other entity. That was possible before 1919. But since, on Libya's case, title to the territory in question belonged to Italy as successor to the Ottoman Empire, the situation could not have been one of complete subjugation. So far as partial subjugation was concerned, different views of the position were held. For example, Verosta has recently summarized the law on this point in the following way:

> "Acquisition of territory required the approval of the former sovereign. Conquest as such conferred no legal title. Cession only became legally valid after the conclusion of a treaty, usually a peace treaty." (*Encyclopedia of Public International*, Vol. 7, p. 166.)

19. This was the position adopted by many standard treatises on international law in the 19th century (see e.g., Jean-Louis Klüber, *Droits des gens moderne de l'Europe* (1819), Vol. 2, p. 298; Heffter, *Das Europäische Völkerrecht des Gegenwart* (1948), P. 229). It was also the view stated for instance by the Supreme Court of the United States (see *The American and Ocean Insurance Companies* v. *356 Bales of Cotton* (1828) Peters, p. 510 at p. 536. *Cf.* also *Bindels* v. *Administration des Finances*, [1947] *Annual Digest and Reports of Public International Law Cases*, p. 45 at p. 49). Phillipson's standard work, published in 1916, concluded that in nearly all of the cases of partial annexation, the transfer of sovereignty occurred on the basis of a subsequent

treaty (C. Phillipson, *The Termination of War* (London, 1916)). It is true that another tradition, represented by writers such as Hall, who was cited by Professor Higgins (CR 93/24, p. 38), did allow conquest as such as a root of title. But in the case of acquisition of part of a territory, it is hard to see how Hall's position was consistent with the rules relating to prescription, which required a substantial period of adverse possession. The rules relating to prescription, the attitude taken by the defeated or excluded sovereign remained significant. Professor Higgins herself said it remained significant in the case of Argentina. And this suggests that the mere fact of conquest could not itself have produced a transfer of legal title.

20. Applying this conclusion to our case, the essential point is that if the whole territory, including the borderlands, was under Ottoman sovereignty, and if Italy succeeded to that title, then even under the pre-covenant law France could acquire title to all or part of the borderlands only in three ways. Either by cession (because this would be a case of partial annexation, not *debellatio*). Or by consolidation. Or by arguing that the territory had been abandoned and had become *terra nullius*. But first, there was no cession; there were not doubt opportunities for cession, for example in 1947, but that did not occur. Secondly, as Professor Bowett has shown, there was no consolidation, given Italian protests and the subsequent uncertain diplomatic history (CR 93/20, pp. 14-19). And Chad has not argued, and could not argue, that the territory became *terra nullius* in 1913 (cf. CR 93/19, p. 44), notwithstanding that the French took the library away. And if that is true before 1919, it must be true, *a fortiori*, in relation to the subsequent period when the law was developing further in the direction of the prohibition of the use of force as a method of acquiring rights. This point will be taken further by Professor Bowett in his discussion of French *effectivités* after 1913.

F. Decolonization and territorial integrity

21. Mr. President, I now turn to a group of issues, presented in the most apocalyptic terms by two members of *l'équipe tchadienne*, and related to the modern law of territorial integrity and self-determination. By operation of law, Professors Higgins and Franck argued, Libya's claim — even if it had been valid in, say, 1947 — had been lost. Any other decision on the part of the Court

would, they warned, produce the most awful consequences. The law whose operation avoided such cataclysms, in their view, took two forms, particular and general. The first was the particular rule of intangibility of frontiers announced by the OAU in the Cairo resolution; the second was the general law of self-determination and territorial integrity. I will deal with the particular first.

(a) The effect of OAU resolution 16(I) (the Cairo resolution)

22. On 21 July 1964, the OAU adopted the Cairo resolution. Two States, Morocco and Somalia, reserved their positions. Libya did not, but supported the Resolution, and Sir Ian Sinclair has explained why. But seeing Libya's support for the Cairo resolution as another hedge under which a tacit acquiescence might be hiding, Professor Higgins pounced. She argued that because Libya did not protest or lodge a reservation to resolution 16(I), it therefore acquiesced in the existing boundary with Chad, independently of the legal validity of that boundary (CR 93/21, pp. 32-3). But it is clear that the purpose and effect of the Cairo resolution was to confirm the status quo so far as boundaries were concerned, "the boundaries existing on their achievement of national independence". The phrase is reminiscent of that in the 1955 Treaty itself and had, in Libya's submission, precisely the same effect. Just as the 1955 Treaty did not create a boundary where none previously existed, so the 1964 resolution did not do so. Otherwise its effect would have been to eliminate all existing boundary disputes in Africa, except perhaps those involving Morocco and Somalia.

23. The point is explained by Brownlie, held out as an authority on the subject by Chad, in his book on *African Boundaries*, in the following terms:

> "The object of the Cairo resolution was realistic enough: decolonization was not to be the occasion for new sources of doubt and controversy. This policy does not and cannot avoid all disputes. Thus where a colonial alignment was obscure, or remained undemarcated, the inheritors would face the same boundary problems — but no more . . . [T]he principle . . . does not erase the existing agenda of disputes." (I. Brownlie, *African Boundaries* (1979), pp. 11-12.)

24. It should be noted that the members of the OAU were put under considerable pressure not to raise individual disputes at Cairo: the resolution was seen as a statement of general principle, not a determination of particular cases. In the case of the two States that did make reservations to the Cairo resolution, Morocco and Somalia, their disputes were then under active consideration by the

OAU, and, I might say, did not involve disputes about where boundaries were to be located. It was no doubt this which caused them to make those reservations, despite pressure not to do so.

25. In fact neither the OAU nor major African States have regarded the Cairo resolution as disposing of particular territorial disputes, for example in cases where there is said to have been a divergence between administrative boundaries and territorial title at independence. I will take only two examples, and I do so for the purposes of illustration and not to express a view, one way or another, on the issues involved, in those cases. I might have chosen many others, including disputes where it is acknowledged that there is no boundary, even in principle, in a given area.

26. My first example is the dispute between the Arab Republic of Egypt and the Sudan over their land boundary, a dispute which existed at independence and has not yet been settled. The relevant treaty provides that the 22O parallel constituted the boundary between Egypt and the Anglo-Egyptian Sudan. (I note in parenthesis that both were then formally part of the Ottoman Empire in accordance with rules of international law that Chad does not acknowledge.) But the administrative boundary between the two does not follow the 22O parallel in important respects, and there is disagreement between the two States as to the true location of the boundary now. The origins of the dispute go back to 1899-1902 (for details see Brownlie, *African Boundaries* (1979) pp. 110-120).

27. The second example is the dispute over the boundary between Ethiopia and Kenya, which arose in 1891 and was settled by treaty in 1970. That dispute involved a question of the limits of tribal penetration of a given area, a discrepancy between a treaty line and a *de facto* boundary, an unratified boundary demarcation which nonetheless had a degree of intrinsic authority (see Brownlie, *op. cit.*, pp. 775-825).

28. Mr. President, if Professor Higgins was right about the effect of the OAU resolution, why were not other States which remained silent at Cairo (for example, Egypt itself, a prime mover of the resolution) prevented by their silence from maintaining their own disputes? The answer is simple: because the resolution was not concerned to resolve, one way or another, disputes as to title or uncertainties over the location of a boundary. Indeed it would follow from Professor Higgins'

argument that States (such as Algeria or Ethiopia) which remained silent in 1964 would be prejudiced in relation to their disputes by comparison with States (that is, Morocco and Somalia) which did express reservations. No one has ever suggested that the Cairo resolution had, or was intended to have, that effect.

29. This view of the Cairo resolution was confirmed by a Chamber of this Court in the *Frontier Dispute* case. There the Court took the opportunity to make some luminous remarks on the general issue of *uti possidetis juris*. It stressed that this was not just a regional practice adopted in South America or Africa, but "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs" (*I.C.J. Reports 1986*, p. 565). And after referring t the Cairo resolution, the Chamber went on to refer to one particular aspect of the principle which is of particular relevance to our case. It said:

> "The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty." (*I. C. J. Reports 1986*, p. 566.)

The second aspect the Chamber referred to was the *uti possidetis* doctrine as applied to former administrative boundaries within a single colonial State, which is an issue, of course, not involved in the present case. And it then went on to say:

> "The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another . . . There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself [these statements, the Chamber emphasized], are evidently declaratory rather than constitutive . . ." (*Ibid.*)

30. I stress the words "pre-existing international frontiers". Like the general rule of international law to which the Chamber referred — and for that matter, like Article 3 of the 1955 Treaty — the OAU resolution is declaratory rather than constitutive. That resolution does not dissolve or create title, it refers to existing title. And African States are equally bound by it, whether or not they made reservations at Cairo.

31. I should note, for the sake of completeness, that there is no suggestion in the OAU Reports on the present dispute that Libya was in any way precluded from raising its claims because it voted for the Cairo Declaration. Nor indeed did the Report say that Libya's claim violated the *uti possidetis* principle, although the Report did note that that was an issue in the case (*Final Report*, p. 36).

(b) The law of territorial integrity and Libya's failure to obtain an exemption from that law

32. Mr. President, Members of the Court, the second of Chad's apocalyptic arguments was presented by Professor Franck. He argued that under the modern international law of self-determination and territorial integrity, a State cannot seek to re-open territorial issues settled by the exercise of self-determination. Once the people of a given territory have decided on their future, whether in terms of independence or integration with another State, their decision cannot be reopened. Indeed it cannot be reopened even with the support of the people concerned, and even though those people were never given the choice of expressing a preference in favour of the claimant State (CR 93/25, pp. 48-59). This principle excludes irredentist claims as much as secession, and it therefore, he argued, precludes Libya from making the present claim.

33. Professor Franck went further, finding yet another case of acquiescence on Libya's part. Libya had not, like Nigeria in relation to the Northern Cameroons, sought an "exemption" from the principle of territorial integrity when Chad became independent. The General Assembly could, he said, in a given case, grant such an exemption, and allow a separate vote to be taken in part of a self-determination territory by part of its people. Libya could have sought such an exemption and did not do so. Accordingly, in his view, it is now precluded from bringing its claim (CR 93/25, pp. 58-59).

34. And the argument was reinforced by the now customary reference to a chamber of horrors which would be produced if the Court failed to accept the 1919 line. The history of decolonization would have to be rewritten, the clock turned back. The Third World, Professor Franck implied, would lie in ruins (CR 93/25, pp. 63, 67).

35. Mr. President, Members of the Court, you have heard this before, and will be no more impressed at the tactic. Libya does not claim that all or part of the borderlands should be included within its territory on grounds of ethnic affinity or the wishes of its population. Nor, it may be said, does Chad before this Court.

Notwithstanding close links with that population, Libya's claim is not based on ethnic identification, or on the existence of Libyan *irredenta* in Chad. Nor is it based, as were the claims of Morocco and Mauritania to the Western Sahara, on previous legal ties or sovereign rights over the borderlands, legal ties or sovereign rights which had acknowledged to have been supplanted and replaced definitively by the colonizer.

36. Libya's position is different. Libya's position is that in relation to all or part of the borderlands, the sovereignty of the Ottoman Empire, and then of Italy, and now of Libya, was never acquired by France, and thus was never acquired by Chad. If a territorial boundary can be discerned which results from a treaty binding on Libya, and in particular from a treaty listed in Annex I of the 1955 Treaty, Libya accepts that its territory extends no further than that boundary. If no such territorial boundary exists, it claims title to the areas over which it had a valid claim to sovereignty — that is to say, legal title — at the date of its independence. In principle, Chad itself claims no more: it does not say that it acquired sovereignty over the borderlands, or any part of them, by reason of an act of self-determination of the people of the borderlands as such before 1960. Despite Professor Franck, the Parties actually agree on the underlying legal position.

37. That position was stated and I quote again without embarrassment, by the Chamber in the *Frontier Dispute* case. It noted that:

> "At first sight this principle of [*uti possidetis juris*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is to often seen as the wisest course . . . The essential requirement of stability . . . has induced African States judiciously to consent to the respecting of colonial boundaries, and to take account of it in the interpretation of the principle of self-determination of peoples.
>
> Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms." (*I. C. J. Reports 1986*, at p. 567; cf. *idem*, at p. 662 (separate opinion of Judge *ad hoc* Abi-Saab).)

Again I stress the words "the territorial status quo". This was not, as the Court elsewhere made clear, a simple reference to *effectivités* at the moment of independence but to the position of legal title at that time (*I. C. J. Reports 1986*, at p. 566, and on the priority of legal title over *effectivités* see also *idem*, p. 587). The principle of *uti possidetis juris* is the relevant one, a rule of general

international law reflected in the law of decolonization.

38. Indeed it is the *same* rule as that expressed in the OAU resolution. Out of deference to the parallel arguments of by Professors Higgins and Franck I have treated the issue separately but, as the Chamber made clear in the *Frontier Dispute* case, it is the same rule that is involved. And just as there is no basis in Libya's conduct in relation to the Cairo resolution for implying an acquiescence or abandonment of claims, so there is no basis in Libya's conduct in relation to the combined principle of self-determination and territorial integrity.

G. Conclusion

39. Mr. President, Members of the Court, in this case, those two horsemen of the apocalypse, Professors Higgins and Franck, have ridden up to the bar, not once but repeatedly, reporting all sorts of catastrophes and difficulties from beyond the horizon. These catastrophes and difficulties will ensue, they warn, if this Court decides this specific case against Chad. In effect they ask the Court to take its eyes off the present case in order to contemplate the possible consequences, and to be terrified at them. But the problems of the world, among which territorial and boundary disputes are undoubtedly to be counted, are not to be solved collectively, as a job-lot. They are to be solved by looking at the particulars, the details in which, as Mr. Sohier reminds us, the good Lord, in English it is usually translated as the devil, resides. Indeed you might wonder why Chad has issued these vague and portentous threats when it could have been concentrating on the merits of its particular arguments. This is a well-known strategy of Counsel with a bad case, a case in which they have no confidence.

40. Mr. President, Members of the Court, two responses can be made to the *in terrorem* arguments.

41. The first response is, as I have shown, that the threats are wildly exaggerated; the misapprehended consequences are unjustified in law. The sky will not fall if Chad's boundary is held to lie somewhere other than along the 1919 line.

42. The second response is that the claims presented by the Parties are particular indeed. Chad's primary argument here is that a territorial boundary was created by three treaties. None of

them purported to establish a territorial boundary. Each of them was concluded between States which were not at the time sovereign on either side of the line. Each of them referred to a quite different line. The Court need have no fears that its decision on that argument will create an undesirable precedent, or indeed, because the argument is special, any precedent at all.

43. Thank you for your attention, Mr. President, Members of the Court. Mr. President, I ask that you call on Professor Dolzer who will address you on the issue of title to the borderlands in the period before the Treaty of Ouchy.

The PRESIDENT: Thank you very much Professor Crawford. Professor Dolzer.

Professor DOLZER: Mr. President, Members of the Court, in Chad's first round presentation, Professor Shaw set out the points which I shall address today in supplementing the formulation of Libya's case in legal terms by Professor Crawford. Professor Shaw essentially made four points (CR 93/24, p. 21):

— *First*, that the Ottoman Empire never acquired title to areas of the borderlands because any Ottoman control exercised there never constituted effective control. This proposition relies, in turn, on the argument that Ottoman control was short-lived and purely military in nature;

— *Second*, Professor Shaw said that the Senoussi were a purely religious sect, exercising only intermittent influence, which was particularly weak as he said in the borderlands;

— *Third*, that the Senoussi never accepted the establishment of Ottoman authority in the borderlands;

— *Fourth*, that the indigenous peoples and tribes were insufficiently organized to hold any real territorial title, the prime example being the clan-organized Toubou; and that these tribes, Professor Shaw said, never accepted Ottoman authority or Senoussi leadership or control.

Mr. President, Members of the Court, Chad makes these contentions without any real attempt to address the evidence that Libya has produced that proves them wrong. Since Mr. Maghur has dealt with so much of this during his second intervention during the first round, and in his speech

during the second round, I need only briefly address certain of the major points.

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Ottoman Sovereignty

As to the first of Chad's contentions concerning Ottoman control in the borderlands, the evidence positively establishing the fact of Ottoman control may be found in Part IV of Libya's Memorial and in the documents annexed to Libya's Reply. Professor Shaw has chosen to ignore this evidence; and he also ignores the evidence of French recognition of effective Ottoman authority in the borderlands in the period 1908 to 1913.

We do note, however, that there is a new nuance inasmuch as Chad now does speak of the exercise of Ottoman sovereignty, and I quote Professor Shaw:

> "Such exercise of Ottoman sovereignty as there was at the relevant time was ephemeral, disjointed and exclusively military". (CR 93/24, p. 21.)

That sentence is, of course, remarkable inasmuch as it seems to imply that, indeed, sovereign rights were exercised by the Ottomans. International law knows of no concept of "half-sovereignty" or "almost sovereignty". Either sovereignty is established, or it does not exist; *tertium non datur*.

Now Chad's pleadings also fail to reflect an understanding of the nature of the Ottoman installations established in the borderlands. These installations were civil in character, headed by a *Kaimakam* appointed by the *Mudir* of Mouzouk, who in turn reported to the *Wali* of Tripoli. They were organized in the typical Ottoman-Islamic way of delegation by authority. The principal Ottoman forces were gendarmes with a complement of military troops. The gendarmes were largely Fezzanese Arabs. This was a continuation southward of the installation of direct Ottoman control that began in Tripoli in 1835 following the French take-over in Algiers. But not by Ottoman military force by the direct assertion of Ottoman sovereign authority.

In the period 1908 to mid-1913, the borderlands fell under the total control of the Ottoman Empire, a control only possible as a result of the acceptance of the local peoples and of the Senoussi Order who, in turn, controlled and led the various tribes. The Ottoman control and authority exercised in the borderlands was far more effective up until the Treaty of Ouchy, and was far more effective than the meagre French military presence that followed. A moment ago Professor

Crawford has drawn your attention to the double standard of Chad in this context.

Since the above was quite fully dealt with by Libya during the first round and in the written pleadings, I should now like to concentrate on French recognition of Ottoman control at the time and on the coming into being of *a modus vivendi* between the French and the Ottomans.

The French official military history of the AEF, over and over again refers to this *modus vivendi* and to the instructions of the French Government in Paris to the local forces to respect this. The *de facto* line resulting, running roughly along 15O N latitude, is again illustrated on the screen. I should like today only to mention one telling example of French recognition, which concerns the correspondence between the French commander of the AEF military forces, Colonel Largeau, and the senior Ottoman military officer at Aïn Galakka, Captain Rifky.

This key document is a letter sent by Colonel Largeau to Captain Rifky on 2 September 1911 (see RL, Exhibit 11.3). This was some months after Colonel Largeau learned of Ottoman authority being established at Aïn Galakka. His letter had been delayed by higher French authorities, who insisted that the proposed letter submitted by Colonel Largeau on 10 May 1911 be toned down.

The May draft by Colonel Largeau contained a firm protest lodged against the Ottoman presence in Borkou. This protest was required to be deleted in the final version. No word of protest appears in the letter sent. What remained in the letter was a reservation of French rights based on what were described as the "diplomatic accords" establishing a French sphere of influence.

In his May draft, Colonel Largeau also threatened to chase back to Borkou any *rezzous* that originated from there. In the final version, that threat was eliminated and the Ottoman representative was requested, in the spirit of good neighbourly relations, "to use all of his power to halt the formation of *rezzous* in Borkou". Moreover, the final version asked the Ottomans to issue a *laisser-passer* (a permit) to any inhabitant of Borkou wishing to visit Kanem or Ouadaï.

Mr. President, Members of the Court, this letter, as modified, and finally sent, clearly reflected French recognition of the exercise of effective Ottoman authority in Borkou.

What the final letter also brings out is that the so-called French "protests" consisted of the alleged reservation of rights, in reality not existing, combined with an acknowledgement of Ottoman

control pending the resolution of their dispute over the Ottoman hinterland through negotiations to be conducted by the joint commission scheduled to meet in Tripoli at the end of 1911. Now of course the Italian conquest of Libya and the defeat of Ottoman forces there leading to the Treaty of Ouchy, put a halt to these negotiations.

Chad suggested in the oral pleadings that France accepted the *modus vivendi* line in order to stay neutral between Italy and the Ottomans. The war between Italy and the Ottoman Empire started only on 29 September 1911. Five months earlier, in April 1911, the French Ministry of Colonies had already stated in the Chamber of Deputies that France had checked the situation on the ground, but had decided not to take any action against the Ottomans in the borderlands (ML, p. 140, para. 4.146). The French Minister explained this position before the war not on the basis of arguments of neutrality but on the basis of France's alleged rights under existing treaties. Clearly, France treated the sphere of influence agreement as creating territorial rights against a third party, an indefensible position and one which Chad does not seek to defend before this Court.

I should mention also, while on the subject of French recognition of Ottoman control, the documents appearing in Exhibit 11.3 to Libya's Reply. For example, in a dispatch of 2 October 1911, the French Minister of Colonies pointed to the construction by the Ottomans of a blockhouse in Tibesti as "une manifestation indiscutable de l'occupation effective ottomane dans ces régions".

In oral argument, Chad suggested that the Ottomans had their very first contacts with the borderlands in 1908 (CR 93/23, p. 77). This is not so. The *Wali* of Tripoli, in conjunction with the Senoussi, controlled the north-south caravan routes that traversed the borderlands; (see ML, p. 47, para. 3.54 *et seq.* and p. 81, para. 4.30). This, indeed, had been a principal basis of the 1890 Ottoman claim to a Tripolitanian hinterland.

The north-south trade routes across the Sahara were an essential element in the economic life of the peoples of the borderlands and of the Sudan further south. The trade routes formed an economic nexus between the Mediterranean and the Sudanic States, with the tribes of the desert overseeing their safety and the maintenance of oases along the way.

During the first round, Libya brought out the fact that the *Wali* of Tripoli — acting under authority delegated to him by the Caliph — controlled entry into these areas. To go south into the borderlands at the turn of the century, an Ottoman permit (*laisser-passer*) was essential.

The Senoussi

The Court has earlier seen a map which shows the Senoussi presence in the borderlands. I have had this map placed back now on the screen.

Professor Shaw has asserted on 30 June (CR 93/24, p. 12) that the Senoussi failed to achieve "a certain level of organization and central direction" and therefore were not capable of holding title alone or in concert with others. He premised his argument that the Senoussi were incapable of exercising sovereign authority over the borderlands on the assertion that the Senoussi were essentially a religious movement that added a military dimension only with the appearance of the French from the south. From this, Professor Shaw concluded that the Senoussi "never exercised sovereign rights over the indigenous peoples" (CR 93/24, p. 21).

Mr. President, this is simply incorrect.

The Court will be aware that this assertion is also at odds with Chad's statements in its Memorial, and I cite from the English translation:

> "It can easily be demonstrated that neither France nor Great Britain after the 1899 Declaration, and neither France nor Italy after the 1902 Agreement, acquired any sovereign rights over the B.E.T. by virtue of these agreements. *For indeed, at the time, and until 1912, it was the Senoussi who exercised sovereign rights over the region.*" (MC, p. 254, para. 177; emphasis added.)

Instead of this position taken in the Memorial, Chad now seeks to rely on Evans-Pritchard, a leading authority on the Senoussi, to the effect that the political and economic organization of the Senoussi was crude (CR 93/24, p. 12). But here, Chad focuses only on the Senoussi leadership without looking at the broader context of power. But Evans-Pritchard, the same author that Chad quotes, also wrote:

> "I have maintained in the foregoing pages that the Sanusiya kept its cohesion and developed into a political organization largely because it was identified with the tribal system of the Bedowin." (Evans-Pritchard, p. 84.)

To this can be added a *contemporary* account of a British authority furnished to the Foreign

Office in 1918 which described the role of the Senoussi and their *zawiyas* in the following terms:

> "for all and sundry, the Zawiya afforded a secure and profitable meeting place where domestic, tribal, commercial, religious and legal difficulties could be arranged, *and such contact with the outer world maintained as was politically desirable or commercially necessary*" (ML, p. 46, and British Archives Annex, p. 127; emphasis added).

I have emphasized, in particular, the last part of this sentence which attests to the Senoussi's role with respect to the political and commercial contacts with the outside world, for it reflects the fact that the Senoussi exercised these attributes of sovereignty.

Chad's entire effort to equate the religious basis of the Senoussi with an organized entity incapable of holding any rights under international law, is unconvincing on its face. Libya has fully addressed the Senoussi and their organization in the written pleadings (ML, pp. 9-11, 44-55). Allow me to quote Evans-Pritchard again:

> "They were schools, caravanserai, commercial centres,social centres, forts, courts of law, banks, store-houses, poor-houses, sanctuary, and burial grounds, besides being channels through which ran a generous stream of God's blessing. They were centres of culture and security in a wild country and amid a fierce people." (Evans-Pritchard, p. 79.)

Moreover, Mr. President, if the Senoussi were not capable of exercising sovereign authority over the borderlands, as Chad *now* contents, then why, in 1911, did the French attempt to negotiate a *modus vivendi* with them? You will recall that the French Ministry of Colonies had given specific instructions to M. Bonnel de Mezières to reach such an agreement with the Senoussi and to assure them that the French had no intention of going beyond Arada, which, as Mr. Maghur showed you, lies at 15° N latitude. Clearly, the French recognized the Senoussi as exercising authority and control over the areas lying to the north of 15°, and therefore were prepared to negotiate with them, not with the individual tribes whom the Senoussi organized.

Ottoman — Senoussi Links

I turn to my third subject. In the oral hearings, Chad not only denied that the Senoussi had a minimum level of organization, Chad also asserted that the link between the Ottomans and the Senoussi did not exist.

Now, Mr. Maghur has shown at great length how the system of delegated power operated

between the Ottomans and the Senoussi, and Chad has produced no evidence to the contrary.

And it is not an Ottoman source, but a *French* document put in evidence in this case (ML, French Archives Annex, p. 43) which presents the most direct and the most relevant report of the relationship between Ottoman and the Senoussi. According to this French report, a Turkish officer "aurait été appelé par les Marabouts senoussistes de Koufra pour inspecter la garnison de la Zaouiech senoussiste composée d'arabes tripolitains et porter à Aïn Galakka un drapeau turc". The Senoussi did not ask the Ottomans for advice, they asked them to fly the Turkish flag, and the Ottomans acted promptly.

Nevertheless, Chad still doubts whether the Senoussi indeed welcomed the presence of the Ottomans during the relevant period. The fact that the Senoussi accepted the authority of the Ottomans is expressly stated in that famous letter addressed by the Head of the Senoussi in 1911 to the major European Powers, to which Mr. Maghur has already drawn the attention of the Court in the first round.

In that letter, the Senoussi indicated in the clearest terms that he considered at the time that the borderlands belonged to the Ottoman Empire: The letter states:

> "When the agreement was made between Britain and France concerning Egypt and the Sudan, France illegally took part of the Turkish possessions to the north of Lake Chad and certain lands forming part of the vilayet of Tripolitania." (ML, Exhibits, Annex, Vol. 6, No. 47.)

And in the same document, the Senoussi are referred to as "subjects" of the Sublime Porte. The allegiance of the Senoussi and the Senoussi peoples to the Caliph at the time is an established, proven fact.

The Senoussi and the Senoussi Tribes

I turn now to my fourth subject, the indigenous tribes. Focusing on the Toubou, Professor Shaw tried to establish that the Toubou, because they were organized by clans, failed to qualify as organized peoples capable of holding territorial title.

Mr. President, it seems absurd to me to try to distinguish between these various borderland tribes. Were the Tuareg tribes sufficiently organized to hold territorial title, but the Toubou not? We know that the French Government in 1864 entered into a treaty with the Ajjir Tuareg, certainly a

recognition of their status as holders of title. Are the Toubou so different because they are organized into clans? Surely, the Court does not want to open the doors to legal assertions based on quibbling about the complexities of tribal organizations in the borderlands.

What is clear, as Chad admits, is that the tribes lived in territory which was not *terra nullius*. And, as described and documented in great detail in Libya's pleadings, these tribes were organized and led by the Senoussi who played an instrumental role in mediating inter-tribal disputes, providing education, maintaining commerce and, ultimately, organizing defence against the French.

Ottoman Administration compared with French Military Presence

Mr. President, I invite the Court to compare the nature of the Ottoman and the Senoussi administration and control with the French invasion of the borderlands.

After initial, unsuccessful attempts, the French sacked Bir Alali in 1902 and destroyed the famous library there. Further attacks were mounted against the indigenous peoples whose defence was organized and led by the Senoussi. We have documented these incidents in our pleadings and illustrated them for the Court during the first round. This situation persisted until 1911-1912 when the *modus vivendi* came into being with the Ottomans and the French, and when discussions were opened up.

Now, contrary to the Ottomans and the Senoussi, the French advance into the borderlands was not welcomed by the people; it was vigorously opposed and fought against. The French presence was a purely military and hostile presence.

Long after the Ottomans were obliged to withdraw from the borderlands in 1913, the Senoussi continued to organize resistance against the French, even into the 1920s and 1930s.

The Ottoman-Senoussi administration and control of the borderlands was civil and peaceful; the French presence was purely military and not peaceful until long after 1919.

Mr. President, Libya's pleadings have spelled out in such detail and with such a plethora of evidence the key facts, that it is difficult for us to take seriously the uninformed and undocumented contentions of Chad on this point. They only mirror the biased French military accounts that so prejudiced the views of the French Government at the time toward the Senoussi and regarding the

extent and nature of Ottoman assertion of sovereignty. The Court has heard a detailed, very substantive account from Mr. Maghur on these very matters during the first round and there is no need in this rebuttal to add more.

Concluding Remarks

Against the background of the lack of convincing arguments on the part of France, formerly and Chad, today, one wonders why both States would insist that the Ottomans did not acquire a joint title by 1912. Why, one asks, would Chad seek to deny a conclusion which the evidence so clearly establishes? Well, the reason is obvious. It was difficult, apparently for France, and it is difficult for Chad today, to admit that at the historical origin of the dispute lies an incorrect assessment of the legal situation on the part of France, that is to say that France wrongly argued at the time that the 1819 Declaration gave it territorial rights. France must have known, and Chad knows today, that once that incorrect assessment at the origin of the dispute is revealed, the interpretation of the further sequence of events becomes flawed, and the house of cards, the entire case which was built by France, starts to collapse.

Ultimately, Libya submits, this is the simple reason why France and Chad have tried so desperately to invent arguments and to avoid the facts in order to deny the title which the Ottomans and the Senoussi had, in reality, acquired by 1912.

Mr. President, Members of the Court, this concludes my part. It may be a good time for a break, if you agree. I thank you for your attention, and I would be grateful, Mr. President, if, after the break, you would call on Professor Bowett.

The PRESIDENT: Thank you very much, Professor Dolzer. We will do that, we will take our break now.

The Court adjourned from 11.15 to 11.35 a.m.

The PRESIDENT: Professor Bowett.

Mr. BOWETT: Mr. President, Members of the Court, it is my task, initially, to address the issue of *effectivités*, that is the question whether France, or later Chad, demonstrated effective, governmental or administrative control over the borderlands.

Effectivités

There is, however, an initial note of caution to be recorded. The relevance of *effectivités*, so crucial to Chad's second and third theories, depends on how the Court characterizes the territory.

If the Court decides, contrary to the views of both Libya and now Chad, that when the French military forces arrived in the borderlands they were *terra nullius*, then certainly *effectivités* become highly relevant. For any title would be acquired by occupation, and thus based on *effectivités*. And it would be important to contrast what France, and later Chad, had done by way of actual administration with what the Ottoman Empire, the Senoussi, Italy, and then Libya had done. The Court could legitimately weigh and contrast the competing evidence to see who had the better title.

But if, as both Parties agree, the territory was not *terra nullius* and there was a pre-existing title the position changes radically. For France has to prove a *derivative* title and such a title has in this case to be based on *conquest*. As Professor Crawford has just indicated, we must reject this curious notion of "non-technical occupation" advanced by Professor Higgins. It has no place in the law: it means conquest, however you call it.

And if the mode of acquisition truly is conquest, and if the Court accepts that acquisition of territorial title by conquest was unlawful after 1919, it follows that a claim of title based on conquest is invalid.

So the question then becomes whether this invalidity can be "cured" by evidence of effective occupation. Prima facie, it cannot. On this point I agree entirely with Professor Higgins. As she rightly says:

> "military occupation precludes subsequent acts from being considered as *effectivités*, which can on the one hand displace an existing title and on the other evidence displays of sovereignty to acquire new title" (CR 92/26, p. 29).

That is exactly the principle to be applied to the French military occupation of the borderlands. A title claimed in violation of one of the most fundamental — perhaps *the* most fundamental — rules of law, the prohibition of war as a means of territorial acquisition, cannot be cured by occupation or evidence of control.

To give but one example of the irrelevance of control where the title is defective, there is little doubt that South Africa performed many acts of sovereignty in the territory of South West Africa, pursuant to its claim that it had annexed that territory. No one doubted the "effectiveness" of South African control. But that did not avail South Africa, because the international community rightly regarded South Africa's claim of title as void *ab initio*.

Let me make two things clear. First, I do not doubt that the general recognition by the international community of a title could cure this defect: but this has not occurred in this case. Second, I am *not* trying to apply rules of law retrospectively. I ask only that the Court applies Article X of the League Covenant to French military penetration of the borderlands *after* 1919: and applies the Pact of Paris to such penetration *after* 1928.

However, if the application of those legal rules produces an invalid title, it is certainly not cured by the failure of Italy, or later Libya, to protest. No one State can "acquiesce" in a violation of such rules: only the international community as a whole can do that.

Subject to that important qualification, let us look at the evidence on which Chad now relies. And I think the picture is best looked at chronologically.

1. The evidence of *effectivités*

(a) Prior to 1919

I see no reason to retract what I said in the first round. The French had withdrawn from Tibesti entirely, and they had two companies at Faya and Fada, with small outposts at Aïn Galakka, Gouro and Ounianga. You can see their location on the screen — it is map 82 in your folder. I have added the strict south-east line.

Professor Cassese emphasizes that the borderlands are not Holland: I agree. But 300-400 men to occupy and *administer* this vast territory? Even a Dutchman would blush at that claim.

Professor Cassese says that France sent reconnaissance patrols — *tournées militaires* — frequently into Tibesti during the period 1916-1929 (CR 93/24, p. 49). We must be careful not to over-estimate this military activity. Patrols were sent intermittently — in July 1916, January 1917, April 1919, February-March 1922 — Captain Rottier's mission — June-September 1923, and January 1929 (see CML, Vol. 1, pp. 276-277). Thus, several years might elapse between patrols. The patrols were designed either to inflict reprisals on the Tibesti tribes, or to gain scientific and other information. There can be no basis for a claim that Tibesti was "occupied", and Chad does not dispute that permanent posts were not re-established by France until 1929.

I accept that the clashes between the Senoussi tribes and the French were sporadic. As I said, this type of guerilla warfare suited the tribes. But no conclusion of general, complete control can be drawn from this. The real explanation is that the French were so few, and so widely-dispersed, they did not greatly trouble the tribes.

To say, as Professor Cassese does (CR 93/24, p. 53), that it was enough for France to control four oases, and spread out from there over the surrounding districts, controlling the caravan routes, is *not* to prove effective occupation. The Ottomans, too, had such control prior to 1913, and yet Chad denies there was Ottoman sovereignty. Such control as France did exercise merely demonstrates the interest of France in keeping control over its lines of communication — the caravan routes. It says nothing of control over the inhabitants and the exercise of powers of administration.

Certainly Professor Cassese asserts that the BET was placed under civil administration in 1917 — with French officers exercising powers of justice, taxation, and census-taking (p. 56). But where is the evidence that they did anything? An administrative order is not, *per se*, effective occupation: it is a piece of paper, and nothing more, without proof that such powers were effectively exercised.

(b) The period 1919-1928

We are told nothing of this period. We know from the French Military History that the French camel-troops were re-organized and concentrated on Kanem, Borkou and Ennedi in 1924 (CML, Vol. 2, Exh. 13, p. 485). So this confirms that Tibesti was not occupied. For the rest of the BET

we are told nothing until the re-occupation of Tibesti — or certain posts in Tibesti — in 1929. Military responsibility for Tibesti was transformed from the AOF (that is to say Niger) to the AEF (Chad) in November 1929, and administrative responsibility was transferred in the following year. The reason for the transfer was to unify the territories facing a perceived Italian threat.

(c) The Period 1928 onwards

Now as to the period after 1928. We know that Bardai, in Tibesti, was occupied by the sixth company. And Professor Cassese tells us France assumed additional civil responsibilities: the organization of education, the establishment of prisons, the organization of elections (p. 56). But where and when was this? Do we have any evidence of this "contrôle étatique"? Certainly not in Professor Cassese's speech.

And through all of this evidence of what France did, there is a question about *why* France did it: was there really an intention to occupy as sovereign? On 30 June, Professor Cassese attempted to illustrate "the intention of the French to occupy the BET in order to exercise their sovereign power", those are his words. In other words, France's *animus possidendi*. In this respect, he referred to four annexes to the pleadings of Chad or Libya (CR 93/24, pp. 54-55). And I think we should look at these four documents.

As to the first, the note by Colonel Largeau of 1911, I would say that it concerns Borkou and not the BET as a whole (MC, Vol. II, Ann. 83).

The second document is an internal French correspondence in 1913 between the Ministry of the Colonies and the Ministry of Foreign Affairs (Ann. 87). I doubt whether it shows a French recognition of the urgency of a manifestation of *animus possidendi*: it says "The commander of the territory of Chad . . . on leave in France, should, following his return to the colony, and after a study on the ground . . . examine the opportunity of an immediate organization of Borkou. He will act in agreement, if necessary, with the military commander of Niger so that the operation undertaken to this end be followed by an affirmation 'on the Tibesti'." Now I offer that only as a tentative translation because the document is not very legible. But, clearly this is a discussion of future plans, not an actual assertion of sovereignty over Tibesti.

Professor Cassese makes much of the promulgation of legislative instruments as the "best evidence" of an *animus possidendi*. I have re-read these documents carefully, as well as those Chad included in its pleadings, and I must say that I could not find in any of them any specific mention of the BET. The texts mentioned are general in so far as they cover either the whole of French Equatorial Africa or the military territory of Chad as a whole.

2. The Legal Effect of the so-called *effectivités*

What of the legal effects of these *effectivités*? The effect of these *effectivités* was, we are told, to transform the 1899 line — as re-interpreted in 1919 — into a true boundary: in short, to establish French title south of this line.

In my submission, it would be doubtful whether, on this evidence, France could demonstrate effective occupation of a *terra nullius*. Given that this territory was not *terra nullius*, so that France had to displace a pre-existing title; and given further that France purported to do so by military force, contrary to its treaty obligations, the conclusion is clear. France did *not* acquire a valid title.

The only remaining question is whether this defective title could be "cured" by some sort of recognition or acquiescence, so I turn to the question of recognition of the French claim.

3. The question of "recognition" of the French claim

Professor Cassese has suggested to the Court that Italy recognized French title to the Borderlands, based on French *effectivités* (CR 93/24, pp. 59-82). By a somewhat quixotic argument, it is suggested that two Italian protests, in 1924 and 1931, were confined to challenging France's claim of title under the 1919 Convention, but did not challenge the French claim of title under customary international law (p. 60). You may well wonder what the purpose of so limited a protest might be.

Now the Italian Note of Protest of 1924 (MC, Vol. II, Ann. 104) made no distinction of that kind. It simply noted that both Great Britain and France had trespassed beyond the strict south-east line of 1899. It was in no sense a "recognition" of the validity of a customary title acquired by France to the whole of the borderlands.

The internal Italian note of 11 December 1931 simply advised that a note of protest to France should not be confined to the French incursion at Afafi, but should be in quite general terms, protesting against any French attempt to progressively establish military of administrative control over Tibesti. It actually proves the opposite of what Professor Cassese suggests. And, of course, as a purely internal note, never communicated to France, it is not really evidence of recognition in any real sense.

Then there is the Italian school map incident, already covered by Professor Condorelli. Italy agreed to leave white the area of the borderlands — rather than colour them in the same colour as Libya. How this is a recognition of French *effectivités* escapes me.

The next piece of so-called evidence of recognition is the 1935 Treaty. The thesis is that it was a treaty of *cession*: therefore this proves France had title over the area *north* of the 1935 line. Again, Professor Condorelli has dealt with this, so I need only repeat that, by reference to the Italian claim, Italy was ceding territory to France.

So, too, with the 1938 Jef-Jef incident. It conveys no Italian recognition of anything, except perhaps the fact that unarmed Italian workmen chose not to argue with armed French soldiers.

And that, really, is it! That is the evidence put before you by Chad to show that Italy recognized a French customary law title to the whole of the borderlands. We have a phrase in English about "scraping the bottom of the barrel". The Court may well have difficulty in seeing the barrel in an argument so devoid of substance.

But then we are told that Libya, yes *Libya*, recognized French title. And the evidence amounts to the Aouzou incident in 1955, about which the Court has heard more than enough. In 1955 the Libyans were not in a position to know where the boundary lay — and France was not too keen to tell them. Moreover Aouzou is one small village, actually lying *south* of the 1899 strict south-east line. It is *not* the whole borderlands, nor even the whole of the Aouzou Strip.

4. Evidence of a Chadian administration

So we are left, finally, to consider Chad's *effectivités* — what Professor Sorel describes as the Chadian exercise of sovereignty (CR 93/25, pp. 69-85). In fact all the control remained in French

hands. The French military remained until 1965, and French administrative personnel remained until 1968, as Professor Sorel reminds us (at p. 71). It may well be that, under the 1960 technical agreements, these French personnel were regarded formally as acting on behalf of the Chadian Government. One suspects that this was a matter of pure form and that, in practice, they received their instructions from Paris, as before.

Perhaps elementary schooling was undertaken by the Chadians, but probably not powers of government. Even the few exploration permits, granted to French companies, were, one suspects, arranged by the French authorities, with little more than a Chadian signature to authenticate their provenance as the Government of Chad.

So when the rebellion in Northern Chad erupted in 1968, three years after French forces had withdrawn, the reality was *not* that a Chadian administration was evicted. There had never been a real Chadian administration, but only the residue of a French administration.

Mr. President, that brings me to the second, and last, part of my statement.

The task of the Court

Chad's written pleadings showed an attempt to limit the Court's task to choosing between two lines: the so-called 1899-1919 line or the 1935 line. This was done on the basis of an argument that discussions in the OAU and the United Nations formed part of the "context" of the *Accord-Cadre*, and so clarified the meaning of "territorial dispute".

That attempt, plainly ill-conceived, has been abandoned: the argument was legally unsound.

Professor Higgins has now tried a different argument (CR 93/21, pp. 34-50). It rests on two propositions, one of law and one of fact, and both are wrong.

The proposition of law is essentially that a party may not, in litigation, advance an argument or claim not advanced in prior negotiations (p. 48, para. 46; p. 50, para. 50). That is clearly wrong, as every Judge on this Court must know from his own experience. Cases abound to disprove it.

In *Tunisia/Libya* the sheaf of three claim-lines advanced by Tunisia before the Court had never been advanced in negotiations. In *Sharjah/Dubai* Sharjah advanced in litigation a claim for a maritime area for the island of Abu Musa never advanced in negotiations. In the *Gulf of Maine* the

extreme US claim-line was advanced, for the first time, in written pleadings. In the *Taba* case the Israeli argument that pillar 91 could not be located because it was not, in the terms of the *compromis*, the "final" pillar, was made for the first time in the final stage of oral argument. In *El Salvador/Honduras* the El Salvadorian claim that the closing-line across the Gulf of Fonseca was not a "base-line" for the purpose of measuring the territorial sea, but part of the territorial sea of either Nicaragua or El Salvador, appeared for the first time at the Counter-Memorial stage. I suspect this list could be continued all morning.

The truth is that the Court's competence is determined by the terms of the *compromis*, or Special Agreement, nor the prior negotiations over the dispute: prior negotiations of the *compromis* may be relevant as *travaux préparatoires*, but not prior negotiations of the dispute. Here we have given the Court competence over a "territorial dispute", and subject to that broad term, each Party is free to formulate its claims. It may well be that Chad now wishes it had defined the dispute as being confined to the Aouzou strip, or a choice between the two lines. But Chad did not do so: and, if Chad had insisted on so arbitrary a definition, there would have been no Special Agreement.

So, as a matter of law, Chad's proposition is wrong. The Court is not bound to confine the dispute to a meaning favourable to one Party. It is fully competent to examine the claims of both Parties, on their merits, provided they objectively relate to a "territorial dispute".

The proposition is equally wrong on the facts. Professor Higgins has stated:

> "The OAU organs . . . all proceeded on the assumption that the dispute was about the Aouzou strip and Libya's claim was to the 1935 line." (CR 93/21, p. 35.)

Now I want to take the Court through those parts of the Report of the OAU Sub-Committee which dealt with the frontier dispute between Libya and Chad (First Report of the Sub-Committee of Legal and Cartographic Experts, 9 July 1987; Organization of African Unity, Libya-Chad Frontier Dispute, pp. 30-31; MC, Prod. 81). As the Court is aware, Libya provided documentation to this Sub-Committee, but told the Sub-Committee that, in Libya's view, it lacked the technical expertise to resolve the dispute and so Libya made no submissions (Report of May/July Meetings, 1987, p. 28).

Now the 1987 Report summarized the Libyan position on the legal issues in seven propositions. I am going to put up on the screen in English translation the first five of these: you

will find this text and the original French in your folder.

Proposition one. "Was the occupation of Borkou, Tibesti and Ennedi by the Turks really effective according to the criteria of international law?"

Proposition two. "What is the legal effect of the Turkish protests at the time of signature of the Franco-Britannic Treaty of 1899?"

Proposition three. "In the absence of a conventional boundary, was the Turkish hinterland claim, which included the North of Chad, opposable to the other colonial Powers of the period, notably France and Great Britain?"

Proposition four. "Did the Turkish occupation of Northern Chad give rise to a State-like organization according to the criteria of international law?"

Proposition five. "Were there links — historical, linguistic, religious, and above all institutional — between the people of Northern Chad and the peoples of Southern Libya?

In other words, can it stated that the links between the Senoussi and the peoples of Northern Chad could validly constitute a linkage of Northern Chad to Libya?"

Well, not much evidence there that Libya's claim was confined to the Aouzou strip and the 1935 line! All the references are to "Northern Chad". Not much evidence there that, in Professor Franck's words, the OAU "had not the slightest inkling of the case Libya's counsel has produced for this Court" (CR 93/26, p. 51). Now certainly a seventh proposition — the only one referring specifically to the Aouzou strip — raised the question whether Libya's occupation of the Aouzou strip — raised the question whether Libya's occupation of the Aouzou strip since 1973 created a prescriptive right to the strip. But this was seen as one element only in a much wider claim and it was entirely the Committee's idea that a claim might be based on prescription. Libya never contemplated such a claim.

In the 1988 Report (Second Report of the Sub-Committee of Legal and Cartographic Experts, 27 January 1988; Organization of African Unity, Libya-Chad Frontier Dispute, pp. 35-36; MC, Prod. 82) the Sub-Committee again reviewed the elements of Libya's position, as revealed in the Libyan documentation. And, clearly, Libya now appeared to be assuming that the 1935

Franco-Italian Treaty was valid. Now this was an error, although the Sub-Committee's report was inconclusive on this particular point. Even more curious, the summary of Chad's position raises the *question* of the validity of the 1935 Treaty, but does not say that Chad absolutely rejected that the Treaty could have any legal effect. Moreover this Report, in summarizing Chad's position, portrays it as being based exclusively on *treaties*: there is not a hint of any reliance by Chad on French *effectivités*. So, on the argument Chad now makes before this Court, Chad's second and third theories must be excluded, because they were not advanced in any prior negotiations.

What conclusions can we draw from this? Libya certainly seemed to be making an incorrect assumption about the 1935 Treaty. But it needs to be emphasized that Libya made no submissions to the OAU. Quite clearly, Libya had in its documents raised the whole history of the dispute, basing itself on the original Ottoman claims. Libya had *not* confined the dispute to the Aouzou strip. And if Libya made a mistake over the 1935 Treaty in 1978, is Libya to be condemned for ever to plead on the basis of that mistake? Is Libya to be condemned to arguing before this Court on the basis of the 1935 Treaty, despite the fact that Libya accepted nearly fifteen years ago that the 1935 Treaty was never in force? And as to Libya's "silence" about any other basis for claim, the records of the OAU reveal that the Sub-Committee fully understood the nature of the Libyan claim. It was not some ingenious argument conjured up by Libya's counsel years afterwards. Professor Higgins's vivid imagination of the meetings of Libya's counsel may provide some amusement, but it is no substitute for reading the documentary record.

Similarly, careful scrutiny of the documents will show that the suggestion that Libya renounced any claim to the BET is totally unfounded. This "myth" of a Libyan renunciation of claim to the borderlands is yet another way in which Chad tries to confine the Court to the Aouzou strip.

> Professor Higgins is recorded as saying this:
>
> "During the negotiations with France for the Treaty of 1955 Libya renounced any claim to the BET — and did so in the context of accepting that the frontier was the one identified in the treaties of reference annexed to the text of the treaty being prepared." (CR 93/21, p. 31.)

She cites in support of this proposition the "Draft Minutes of 5 March 1955, Annex 342". The relevant part of those Minutes — they are actually the Minutes of 3 March — is now on the

screen. I would like the Court just to cast its eye over that wording.

You will see that the proposition is plainly wrong for the following reasons:

First, the draft minutes prepared by France were never agreed by Libya, and so could not commit Libya to anything.

Second, the wording does not support the proposition. To suggest that this agreed January 1955 formula constitutes a renunciation by Libya of her claim to the borderlands is absurd. It says no such thing. To agree to abide by international agreements in force is *not* to agree to renounce all claims to the borderlands. That would depend entirely on what the effect of the treaties was.

Third, in any event, it was the *French* who, in July 1955, tabled an alternative version of Article 3 which Libya eventually accepted;

And, fourth, this January 1955 text on which Chad relies does not relate solely to the southern boundary and does *not* specify that a pre-existing boundary divides French and Libyan territory throughout its entire length; again, that would depend on the treaties.

Lastly, there was no Annex I in the January 1955 text, so that it is wholly misleading for Professor Higgins to refer to the frontier "identified in the treaties of reference annexed to the text of the treaty being prepared". The Annex did not exist.

Professor Higgins is also recorded as saying, at page 31 of the same statement, that:

> "In 1956 Libya requested the actual demarcation of a section of its frontier with Algeria. It raised no issue about its frontier with Chad."

This too is quite wrong. In the first place, it was *France*, not Libya who requested the re-opening of negotiations in 1956 for the *rectification* of the boundary south of Ghadamès in the region of the Edjc'é oil field. In the second place, Libya *did* propose at the opening of the 1956 negotiations that there should be a general review of the whole frontier to include a review of the agreements or treaties to be resorted to in this regard; but the French delegation adamantly *refused* to undertake such a review. The whole story is spelt out in detail in paragraphs 3.109 to 3.112 of the Counter-Memorial of Libya, with Libya's record of the 1956 negotiations to be found in Exhibit LCM 9. Chad has never responded to this material, and Professor Higgins has given to the Court a very inaccurate picture of what happened.

Mr. President, I turn now to the question of how the Court should approach its task. Having rejected Chad's artificial attempt to restrict that task to a choice between two lines, I am in duty bound to try to assist the Court by expressing a more positive view of how the Court should approach that task.

It is fairly clear what the Court should *not* do. And that is to respond to the ill-concealed invitation by Professor Higgins (CR 93/26, pp. 10-23) to inquire into the causes of the civil war in Chad and the justification — or lack of it — for the so-called "intervention" in that civil war. We have a Special Agreement which Chad wants to construe narrowly, but at the same time to widen out of all recognition. Let us stick to the Special Agreement: the Court is concerned with a territorial dispute.

Within that framework, it seems to me clear that a number of different issues have to be considered. There is one matter I will take first because, in my view, it affords little guidance and should be discounted. I refer to the post-independence conduct of the Parties.

Post-Independence Conduct

A dispassionate observer, reviewing the conduct of both Parties since their independence, might find it difficult to distinguish between them. Situations arose in which both Parties might have made claims, or reserved their positions, or made agreements in more guarded terms.

But it has to be accepted that both Libya and Chad, as newly-independent States, faced unusual difficulties. They both accepted that, necessarily, they shared a common boundary which the Court has to identify in this case. But whether such a boundary had been delimited by agreement, or where it might lie, were not easy questions to answer, given the tortuous and complicated history of this area of Africa.

Chad now suggests, through her counsel, that Libya should be penalized, and should forfeit its claim because that claim was not voiced in 1951, or 1955, or 1960. But the same arguments could be made against Chad which, on many occasions, has negotiated with Libya without expressly safeguarding its claim. Indeed, even France failed to make in 1950-1951, and again in 1955, the claims which Chad now makes. Chad's second and third theories are wholly new.

The doctrine of "forfeiture" of claims, so eloquently made by Professor Franck, cuts both ways. Moreover, it runs counter to the established principle of extinctive prescription. To extinguish a claim requires both knowledge of the claim and the lapse of a long period of time. International practice has known periods of 30 or even 50 years. It would be quite contrary to this principle to visit forfeiture of a claim upon a State, simply because of its failure to advance that claim at an opportune time.

This being the case, there is, in Libya's submission, every reason for the Court to concentrate on the position in 1951 — the date both Parties accept as the critical date, and to see what claims could legitimately had been made on that date. For had the matter been settled then, on the date of Libya's independence, the boundary would have been accepted by all parties.

On that date France accepted — and was bound to accept — that Libya emerged as successor to Italy. Whatever position France might have taken on Libya's claim to have inherited Senoussi and Ottoman claims, it is impossible to believe that France could have denied Libya's succession to Italy. And if Libya succeeded to Italy, and was committed by Italy's conduct as sovereign, then Libya's position in 1951 could be no worse than Italy's.

The Libyan "Colonial" Inheritance from Italy

The position, as between Italy and France can be summarized in three propositions.

1. Italy arguably accepted the 1899 Anglo-French Declaration.

Italy may have questioned the status of that line, that is to say questioned whether it had become a true boundary, but Italy's violent reaction to the 1919 line *may have* implication that Italy accepted the 1899 line, and rejected 1919 *because it departed from the 1899 line*. Much of the Italian map evidence *might* support the argument that Italy accepted a strict south-east line.

2. Italy totally rejected the 1919 line.

The historical record on this is quite clear. Chad's attempt to prove that Italy had lost the right to object to such a line, in 1902 and 1912, is, as Mr. Sohier has shown, quite without foundation.

3. The 1935 Treaty was abortive.

On this Italy and France agreed, and Libya and Chad now agree. The point of dispute is now

whether the 1935 line would have represented a gain, or a loss, of territory to Italy. I find it had to understand why Italy should refuse to ratify a treaty *giving* it territory. The point has some significance because a *loss* to Italy suggests that the prior position was the 1899 line, the strict south-east line: a *gain* implies that the prior position was the 1919 line.

The Libyan Inheritance under Article 13 of the Treaty of London, 1915

There remains, of course, the more controversial question whether, by virtue of *this* treaty provision, Article 13, Italy was entitled to a southern boundary with the French possessions in Chad which was *more beneficial*, more favourable to Italy than the 1899 line. Italy clearly thought so, and based its more ambitious claims in the 1920s-1930s on this argument. The Court has seen demonstrated on the screen the various Italian "programmes", advanced, in part, on the basis of this claim.

In so far as Article 13 envisaged benefits which were *territorial*, and linked to the territory of what is now Libya, Libya is entitled to succeed to those benefits.

The Libyan Inheritance from the Senoussi and the Ottoman Empire

Now, as to the separate Libyan inheritance from the Senoussi and the Ottoman Empire, Libya argues that, quite separately from any claim or title inherited from Italy, Libya has inherited a separate but equally valid title from the Senoussi and the Ottoman Empire to all that territory which, prior to 1919, had not been effectively claimed by France. Now, that date is the controlling date because, whatever Chad may *now* say, the true basis of any French claim to title was conquest: and in 1919 conquest was outlawed as a basis of title.

Chad concedes that there was prior title, prior to the French invasion of the borderlands. And thus the argument for a French title assumes *either* abandonment, to leave the territory as *terra nullius*, or conquest, or "consolidation" as the basis for a new French title.

Abandonment is not argued, and the continuing, hostile presence of the Senoussi, plus the Italian claims, demand rejection of any such argument. "Consolidation" in the form of a general, international recognition was never give: there were too many international maps showing lines

other than the 1919 line for that. And in 1950 the United Nations refused to recognize any specific boundary, so that international recognition of French title up to the 1919 line was not given. Consolidation therefore cannot support the 1919 line.

Thus the issue is conquest. Did France effectively conquer the whole territory? Could conquest give France a valid title in any event? Did Italy's reliance, in negotiations with France, on Article 13 of the Treaty of London, mean an abandonment of the claims based upon the Ottoman succession: or was this simply a negotiating position? And could this commit Libya, as successor State?

Libya says "No" to all questions. And if the Court shares Libya's view then this inheritance has to be added to Libya's "colonial inheritance", and this supports a line based not just on the 1899 strict south-east line *but on the factual evidence of what areas lay within French effective control in 1919.*

The Myth of a Resolution of the Boundary Dispute by General Assembly Resolution 392 (V)

And then we face this myth of a resolution on the boundary dispute, by General Assembly resolution 392 of the fifth session. Now Chad first argues that Libya's territory was fixed by the United Nations in 1951, implicitly, by resolution 392 (V), which Professor Franck has argued involved on the part of the United Nations as acquiescence in the position of France. Mr. President, that argument will not detain the Court for very long. It is quite clear, from the text of resolution 392 (V) and from the surrounding circumstances, including the UN map and Libya's Constitution, that the General Assembly did not then fix Libya's southern boundary. If the resolution did not actually determine that the boundary remained to be delimited, as the English text of the resolution would suggest, it certainly allowed that that might be the case, and that the determination of the boundary was a matter for negotiation between the parties. Chad's argument of United Nations acquiesence cannot be accepted. In fact the parties — Libya and France — in 1955 accepted the need to negotiate, so we can turn to the 1955 Treaty.

The 1955 Franco-Libyan Treaty

As regards the 1955 Treaty, there remains the question of whether, by virtue of this treaty, Libya agreed to surrender any territory or claim to which it was otherwise entitled.

The confusion amongst Chad's counsel as to whether the Treaty was declaratory of a pre-existing title, or constitutive of a new title has already been emphasized by Sir Ian Sinclair.

The "constitutive" view is impossible to accept — no negotiations, no texts, no maps, it defies belief. As an agreement to examine the frontier question on the basis of an agreed list of international instruments, it is acceptable. But in addition, Chad attempts to rely on French *effectivités*, then it must be the *effectivités* on *both* sides: not just French *effectivités*, but also those of the Ottomans and the Senoussi. And to the extent that these become relevant, one moves towards a line nearer to the 15° parallel rather than the 1919 line.

As to the texts themselves, it remains Libya's view that none of those listed in Annex I provides a conventional boundary as between Libya and Chad. The only conventional instruments directly concerning this southern boundary were the 1899 and 1919 agreements, and it is a curious irony of this case that neither Great Britain nor France, the parties to those agreements, in fact held title, either in 1899 or 1919 to the territory north and south of the line they agreed. The Ottoman protest to the 1899 Declaration is a matter of record. It will be for the Court to decide whether Italy's subsequent conduct, as territorial sovereign in succession to the Porte, weakened that protest. The Italian protest against the 1919 line remained firm and unequivocal, and that Chad does not deny.

Negotiations prior to the Critical Date not Producing Agreement

Then there are the negotiations prior to the critical date, but not producing an agreement. These remain a valuable source of reference for the Court precisely because, as I explained in the first round, they reveal the real claims of the Parties. The relevant negotiations are, of course, those between Italy and France, and, though abortive, they confirm that the 1935 line was for Italy a retreat from the boundary to which Italy believed it was entitled.

Other Criteria

The various other criteria which Libya has urged on the Court — geographical, economic, human and strategic — remain, in Libya's view, highly pertinent. Professor Franck has told the Court categorically that the interests of the people of the borderlands are clear, and that they have already exercised their right of self-determination in 1959 (CR 93/25, pp. 58-60). I wish I could share his confidence. The issue put to the vote in 1959 was, under the new 1958 French Constitution, confined to a choice between three forms of association with France, within the French Community, and Chad chose to be a member State. No one asked the people whether they wanted their future to lie with Libya. Given the terms of the Peace Treaty with Italy, these factors cannot be ignored, and it cannot be in the interests of either Party to produce a boundary lacking a basis in good sense. For boundaries must endure. And the boundary to be fixed by this Court will divide Libya and Chad long after the civil war in Chad, or the governmental régimes in Chad and Libya, are matters of history.

Speaking of "endurance", Mr. President, I have the feeling this Court has endured enough. I would ask the Court to accept the thanks of all of Libya's counsel for its patience and courtesy. And, finally, Mr. President, I would ask you to call on Libya's Agent so that he can present Libya's final submissions.

The PRESIDENT: Thank you very much, Professor Bowett. Mr. El-Obeidi, please.

Mr. EL-OBEIDI: Mr. President, distinguished Members of the Court, this brings us to the close of Libya's presentation.

For a dispute such as the present one, which really had its genesis almost 100 years, there are necessarily a great many facts and legal points to put before the Court. Our purpose in these hearings has been to try to narrow the issues dividing the Parties and to assist the Court in appreciating the essential facts.

In this connection, I should note that in addition to the points brought out in our second round on the issue, Libya will be furnishing a written answer to Judge Guillaume's question by the close of these proceedings.

Mr. President, the Court will be aware that it has previously rendered two decisions involving maritime delimitations between Libya and neighbouring States. In each instance, those decisions have helped to solve delimitation questions and have been applied by Libya. In this case as well, Libya has every confidence that the decision of the Court will resolve the territorial dispute between Libya and Chad and will be applied accordingly.

It only remains for me to read for the record Libya's final submissions, which are unchanged.

Submissions

Having regard to the various international treaties, agreements, accords and understandings and their effect or lack of effect on the present dispute, as set out in Libya's Memorial, Counter-Memorial, Reply and oral pleadings;

In view of the other facts and circumstances having a bearing on this case, as discussed above, and in Libya's pleadings;

In the light of the conduct of the Parties, of the conduct of other States or political, secular or religious forces, whose conduct bears on the rights and titles claimed by the Parties, and of the conduct of the indigenous peoples whose territories are the subject of this dispute;

In application of the principles and rules of the international law of relevance to this dispute;

May it please the Court, rejecting all contrary claims and submissions:

To adjudge and declare, as follows:

1. That there exists no boundary, east of Toummo, between Libya and Chad by virtue of any existing international agreement.

2. That in the circumstances, therefore, in deciding upon the attribution of the respective territories as between Libya and Chad in accordance with the rules of international law applicable in this matter, the following factors are relevant:

(i) that the territory in question, at all times, was not *terra nullius*;

(ii) that title to the territory was, at all relevant times, vested in the peoples inhabiting the territory, who were tribes, confederations of tribes or other peoples owing allegiance to the Senoussi Order who had accepted Senoussi leadership in their

fight against the encroachments of France and Italy on their lands;

(iii) that these indigenous peoples were, at all relevant times, religiously, culturally, economically and politically part of the Libyan peoples;

(iv) that, on the international plane, there existing a community of title between the title of the indigenous peoples and the rights and titles of the Ottoman Empire, passed on to Italy in 1912 and inherited by Libya in 1951;

(v) that any claim of Chad rests on the claim inherited from France;

(vi) that the French claim to the area in dispute rested on "actes internationaux" that did not create a territorial boundary east of Toummo, and that there is no valid alternative basis to support the French claim to the area in dispute.

3. That, in the light of the above factors, Libya has clear title to all the territory north of the line shown on map 105 in Libya's Memorial, on map LC-M 55 in Libya's Counter-Memorial and on map LR 32 in Libya's Reply, that is to say the area bounded by a line that starts at the intersection of the eastern boundary of Niger and 18° N latitude, continues in a strict south-east direction until it reaches 15° N latitude, and then follows this parallel eastwards to its junction with the existing boundary between Chad and Sudan.

Thank you, Mr. President and Members of the Court for the courtesy and patience shown by the Court in listening to Libya's case. And, if you would allow me, I would wish to place on record the gratitude of my country to those counsel who have so ably represented Libya. I would also express appreciation of the friendly spirit which the Agent of Chad and his team have shown throughout these proceedings. Thank you very much, Mr. President.

The PRESIDENT: Thank you very much, Mr. El-Obeidi. That completes the presentation by Libya in the oral proceedings and the Court will adjourn until 10 o'clock on Monday morning, when we will begin to hear the Rejoinder of Chad. Thank you very much.

The Court rose at 12.45 p.m.

CR 93/30

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Monday 12 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le lundi 12 juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajobola
	Herczegh
Judges *ad hoc*	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzuti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramadane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris.

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corten, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants,

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: This morning we start the second round of the Chad oral pleadings and first I think it is Mr. Pellet.

Mr. PELLET: Thank you very much, Mr. President. Monsieur le Président, Messieurs les juges.

1. Terminant le second tour des plaidoiries libyennes, l'agent de la Jamahiriya a lu à cette barre les conclusions de son pays.

Elles sont identiques à celles qui figurent dans les écritures de la Libye — les modifier eût constitué l'aveu de l'impasse dans laquelle nos contradicteurs se sont engagés; mais je les soupçonne de les regretter. En prétendant à 600 000 km^2 de territoire tchadien, la Libye s'est du même coup condamnée à justifier devant la Cour, par des arguments juridiques, ses revendications portant sur la moitié du Tchad ainsi que la ligne frontière qui en résulte, qu'elle a fixée au 15^e parallèle nord.

Or, des arguments juridiques, elle n'en a point trouvé.

Certes, une lecture superficielle de son mémoire pouvait faire illusion : le geste de la Senoussia, le mythe de l'*hinterland* tripolitain et les revendications — les revendications, pas les droits... — de l'Italie fasciste faisaient l'affaire pour donner un semblant de légitimité historique aux prétentions libyennes. Quant au 15^e parallèle, on le justifierait par des considérations d'équité de caractère géographique, ethnique, économique et stratégique. Ceci peut avoir une certaine efficacité à des fins de propagande mais peut difficilement s'analyser en une argumentation juridique de nature à convaincre l'organe judiciaire principal des Nations Unies.

2. Au surplus, ces pseudo-fondements juridiques trahissent l'énormité des appétits territoriaux de la Libye :

— la Senoussia avait établi des *zaouias* non seulement dans le BET et le Kanem, mais aussi dans les régions qui relèvent aujourd'hui du Niger et de la Nigéria; les cartes n° 19 et 20 figurant dans le dossier des juges constitué par la Partie libyenne et que celle-ci a complaisamment projetées à maintes reprises se passent de commentaires; elles sont également dans le dossier de plaidoirie d'aujourd'hui;

— les revendications ottomanes, dont vous voyez le schéma derrière moi, superposé avec celui du programme colonial italien maximal conduit aux mêmes constatations; le programme colonial est ici

traduit par une ligne verte, ce programme colonial italien maximal englobe toute la Tunisie, des parties importantes de l'Algérie, du Niger, de la Nigéria, du Cameroun, de la Centrafrique et même un petit bout du Soudan; la réalisation du programme italien — symbolisé par une ligne bleue aurait des effets voisins;

— quant au programme italien minimal (si l'on peut dire !), qui se trouve ici en rouge, sa mise en œuvre conduirait à une amputation importante du Niger et écornerait même l'Algérie — et même un peu plus puisque celle-ci se trouverait privée de 26 700 km^2.

3. La République du Tchad a été, Monsieur le Président, un peu frustrée que la Partie libyenne ait remis à plus tard le soin de répondre à la question que lui avait posée M. Guillaume, le 2 juillet dernier; elle pense que l'occasion lui sera donnée de réagir à cette réponse.

Au demeurant, à sa connaissance, aucune délimitation nouvelle n'est intervenue entre la Libye et le Niger en vue de fixer leur frontière commune, notamment à l'est de Toummo. Celle-ci reste donc fixée par le traité franco-libyen du 10 août 1955 et les accords auxquels celui-ci renvoie; s'agissant du secteur se trouvant à l'est de Toummo, que la Partie libyenne qualifie à tort de "talon d'Achille" de la thèse tchadienne (CR 93/27, p. 26 et CR 93/27, p. 71), il s'agit avant tout de l'échange de lettres franco-italien de 1902.

Si la thèse tchadienne devait périr par son talon, ce sont, comme je l'ai dit le 28 juin (CR 93/22, p. 75), environ 59 000 km^2 de territoire nigérien qui se trouvaient menacés.

4. Il est tout à fait exact, comme M. Maghur l'a indiqué mardi dernier, que l'arrêt de la Cour ne s'imposera pas plus au Niger qu'aux autres Etats que j'ai cités qui sont, si j'ose dire, "juridiquement protégés" par l'article 59 du Statut. Mais cette protection juridique n'est malheureusement pas une protection diplomatique ou politique; les mêmes causes produiront les mêmes effets et si la Cour devait se fonder sur l'argumentation de la Libye dans cette affaire, elle ouvrirait la boîte de Pandore et justifierait par avance toutes les revendications révisionnistes.

5. La Partie libyenne semble avoir pris conscience, tardivement, des implications inévitables de ses positions. Tout en continuant à s'appuyer fortement sur les implantations de *zaouias* senoussistes et sur les revendications ottomanes et coloniales italiennes, la Libye a abandonné virtuellement presque tous ses arguments d'équité — malgré l'hommage appuyé du professeur

Condorelli aux opinions individuelles de MM.Shahaduddeen et Weeramantry dans l'affaire de *Jan Mayen*; nous nous plaisons à nous associer à cet hommage mais en se rappelant qu'il s'agissait d'une affaire de délimitation maritime et, dans ce domaine, "equity has been recognized by this Court as part of international law" (*Délimitation maritime dans la région située entre le Groenland et Jan Mayen*, opinion individuelle de M. Weeramantry, p. 31, par. 80 de la version dactylographiée).

Mais, Monsieur le Président, Messieurs les juges, vous êtes saisis d'une affaire de frontières terrestres à propos desquelles l'équité joue un rôle fort modeste de confirmation d'un titre territorial ou, mieux d'un tracé frontalier, voire même pour combler les lacunes des accords en vigueur; mais, ici, nous avons un traité et l'on voit mal le rôle que pourrait jouer l'équité. "Rien, a dit la Chambre de la Cour en 1986, n'autorise un recours à la notion d'équité pour modifier une frontière établie. Dans le contexte africain, en particulier, on ne saurait invoquer les insuffisances manifestes du point de vue ethnique, géographique ou administratif, de maintes frontières héritées de la colonisation pour affirmer que leur modification s'impose ou se justifie pour modifier une frontière établie" (*Différend frontalier*, *C.I.J. Recueil 1986*, p. 633).

Je viens de le dire : la Libye, abandonnant la thèse soutenue dans son mémoire (p. 25-68 et 422 et suiv.), en est d'accord; *exeunt*, par exemple, les considérations économiques dont, citant la Cour (*C.I.J. Recueil 1982*, p. 77), M. Maghur est venu dire à cette barre qu'ils sont des "facteurs extrinsèques, puisque variables et pouvant à tout moment faire pencher la balance d'un côté ou de l'autre de façon imprévisible" (CR 93/27, p. 15); ce raisonnement vaut, assurément, pour les soi-disant critères géostratégiques et ethniques qu'avait avancés la Libye.

6. Il ne reste donc rien pour justifier la ligne du 15e parallèle. Mais nos contradicteurs n'en abandonnent pas pour autant entièrement l'équité. Comme l'avait déjà fait le professeur Bowett lors du premier tour de plaidoiries (cf. CR 93/20, p. 74) mais de manière plus insistante, ils l'utilisent maintenant non plus pour tenter d'établir le bien-fondé de la ligne du 15e parallèle — qui est pourtant l'objet des conclusions expresses de la Libye — mais pour justifier le tracé qu'avait retenu en son temps le traité Laval-Mussolini. Certes, nous dit-on, il n'a jamais été ratifié et n'est jamais entré en vigueur — contrairement d'ailleurs à ce qu'avait soutenu la Libye avant la saisine de votre Cour — et il constitue, nous dit-on toujours, un abandon scandaleux de territoires (il faudrait mieux dire : "de

revendications territoriales") de la part de l'Italie; mais, en même temps; "ce que la Libye demande" nous dit le professeur Condorelli, est "qu'il soit équitablement tenu compte de la délimitation non entrée en vigueur de 1935" (CR 93/28, p. 56); et le professeur Bowett y est revenu dans sa plaidoirie finale (CR 93/29, p. 68).

Loin de nous, Monsieur le Président, l'idée de vouloir empêcher la Libye de plaider ce qu'elle veut, quand elle le veut. Mais, à l'inverse, elle ne peut nous empêcher de penser qu'il y a là une retraite prudente. En substance, sa position est maintenant la suivante : "nous avons beaucoup exagéré, en présentant des conclusions dépourvues de toute crédibilité; nous ne pouvons pas plaider le traité de 1935 en tant que tel puisque nous avons, imprudemment, reconnu qu'il n'était jamais entré en vigueur et qu'il contredit nos conclusions officielles; essayons au moins de sauver la ligne qu'il retenait en la présentant comme un compromis équitable"; ceci comme si l'équité pouvait donner à un Etat un territoire auquel il n'a pas droit en vertu du droit international !

7. Mais, Monsieur le Président, il y a quelque chose de plus extraordinaire encore dans ce raisonnement.

Nos contradicteurs nous présentent la ligne de 1935 comme l'indication la plus sérieuse d'une frontière répondant aux exigences de l'équité alors que, de leur propre aveu, le traité Laval-Mussolini n'a pas été ratifié. Mais ils oublient totalement le rôle que devrait jouer à cette fin, pourtant très limitée, un autre traité en bonne et due forme dont les deux Parties admettent qu'il a, lui, été ratifié, qu'il est entré en vigueur et qu'il les lie.

Essayons une minute de nous convaincre qu'il y a une logique dans la position libyenne selon laquelle il n'aurait pas existé de frontière avant 1955 et le traité franco-libyen n'en aurait pas non plus fixé une. Ceci défie un peu l'entendement, mais admettons-le un instant. Il faudrait, dans ce cas, considérer que le traité, ratifié, de 1955 et les instruments auxquels il renvoie, ont au moins autant d'importance pour déterminer l'emplacement de la frontière que celui de 1935 qui est, lui, demeuré au niveau des intentions; la Libye ne fait cependant aucune place au traité de 1955 dans le raisonnement qu'elle vous présente et qui est censé vous persuader de l'équité de ses positions. Il est décidément bien difficile de se convaincre qu'il y a une logique dans tout cela — et je ne parle même pas de logique juridique !

Au demeurant, Monsieur le Président, dans sa présentation du 6 juillet 1993, M. Sohier a donné un sage conseil lorsqu'il a rappelé qu'on ne peut se soustraire facilement au traité du 10 août 1955 et faire comme s'il n'existait pas (CR 93/27, p. 39). Voilà qui est fort raisonnable en effet; mais je regrette que le conseil de la Libye n'ait pas été entendu de l'autre côté de la barre et que nos contradicteurs n'aient évoqué cet instrument, pourtant si essentiel, que pour le vider de sa substance et le priver de tout effet utile.

8. Le traité d'amitié et de bon voisinage conclu entre la France et la Libye en 1955 constitue cependant la clé, peut-être pas unique, mais, assurément, la plus simple, la plus évidente, la plus indiscutable, pour résoudre le différend soumis à la Cour. Je dirais, si vous m'autorisez cette image, qu'il ouvre la grande porte, même si cela n'exclut pas que notre construction comporte également des "portes de service" qui peuvent être ouvertes avec d'autres clés auxquelles sont attachées des étiquettes comme "accords antérieurs", "effectivités" ou "acquiescements".

Même si ces chemins, plus détournés, conduisent aux mêmes conclusions, il nous a semblé, Monsieur le Président, Messieurs les juges, que, pour ces dernières plaidoiries, il valait mieux, de nouveau, entrer par la grande porte et suivre l'allée principale, sans nous laisser tenter par des chemins de traverse.

9. Les deux Parties sont du reste d'accord pour accepter le traité de 1955 comme point de départ logique. J'ai mentionné ce qu'a dit M. Sohier mardi dernier, j'aurais pu citer aussi sir Ian Sinclair qui, le même jour, s'est déclaré "glad to note at the outset that Chad continues to attach as much importance and significance to the 1955 Treaty as she did in the formulation of her Memorial" (CR 93/27, p. 27).

Oui, Monsieur le Président, je peux rassurer nos éminents contradicteurs : le Tchad croit, plus que jamais, que le traité de 1955 est décisif dans notre affaire. Plus même : qu'il suffit à trancher la question qui divise les Parties. Il n'est pas seulement le point de départ logique du raisonnement, il en est l'aboutissement.

Mais, et ceci constitue une différence essentielle entre nous, pour la Libye, la France et la Libye n'ont, en 1955, rien décidé en ce qui concerne leurs frontières communes; par l'article 3 de ce traité, laborieusement négocié, elles

> "reconnaissent que les frontières séparant les territoires ... de l'Afrique équatoriale française d'une part, du territoire de la Libye d'autre part, sont celles qui résultent des actes internationaux en vigueur à la date de la constitution du Royaume-Uni de Libye tels qu'ils sont définis dans l'échange de lettres ci-jointes (annexe 1)",

mais ceci ne signifierait strictement rien : il n'y a pas de frontière, nous dit la Libye, quant à l'annexe I, elle énumère ces actes internationaux en vigueur, mais on ne saurait en tirer la moindre conséquence : la même Libye indépendante, qui a accepté cette liste en 1955, vous dit aujourd'hui par la voix de sir Ian Sinclair, "it cannot be argued that the self-same acts *constitute* Libya's boundaries by virtue of the 1955 Treaty alone" (CR 93/27, p. 40).

10. C'est là toute la différence.

Pour le Tchad, ces actes ont, en eux mêmes, fixé la frontière. Mais, quand bien même ils ne suffiraient pas à eux-mêmes, le traité de 1955 y met bon ordre. Il est clair : les Parties "reconnaissent" l'existence d'une frontière et son tracé, tel qu'il résulte des actes internationaux qu'il énumère et qu'il considère comme étant en vigueur; et, en effet, la "mise bout à bout" des secteurs frontaliers qu'ils décrivent permet, sans difficulté particulière, de déterminer une ligne allant du point triple avec le Niger au tripoint avec le Soudan.

Je sais bien, Monsieur le Président, que sir Ian Sinclair nous avertit que "a line is not a frontier, certainly not necessarily a frontier" (CR 93/27, p. 44); mais je ne surprendrai pas le fervent lecteur de Lewis Caroll qu'il semble être (cf. CR 93/15, p. 47) en lui rappelant qu'en revanche

1) une frontière est une ligne; et

2) qu'en la présente occurrence notre ligne est bien une frontière — et ceci pour une raison toute bête, mais qui se suffit à elle-même : les parties au traité de 1955 ont voulu qu'il en soit ainsi.

11. Monsieur le Président, au stade où nous en sommes, il paraît important de se concentrer sur l'essentiel qui, aux yeux de la République du Tchad, a toujours été, et demeure, le traité du 10 août 1955. C'est pourquoi nous avons construit nos plaidoiries en quatre points qui, tous les quatre, vous seront présentés en fonction de cet instrument :

— dans un premier temps, la République du Tchad rappellera que la question du "titre originaire", si elle ne présente pas les difficultés que semble y voir la Partie libyenne, n'a qu'une importance fort limitée dès lors que deux Etats souverains, ayant, sans aucun doute, compétence pour délimiter leur frontière commune sont, en 1955, tombés d'accord pour en déterminer le tracé; nous aborderons cependant cette question pour ne rien laisser dans l'ombre et pour ouvrir la voie au raisonnement central du Tchad;

— dans un deuxième temps, nous examinerons les actes internationaux auxquels se réfère le traité de 1955 (ainsi d'ailleurs que ceux auxquels il ne renvoie pas) et nous montrerons que ces instruments de référence définissent une ligne-frontière au sens plein du terme;

— dans une troisième partie, les conseils du Tchad envisageront ce même traité de 1955 à la lumière des débats qui l'ont précédé et qui l'ont suivi dans les enceintes multilatérales et de la pratique des deux Etats;

— enfin, dans une quatrième partie, nous analyserons, une dernière fois, le texte même de cet instrument incontournable pour montrer que, constitutif ou déclaratif, peu importe, son interprétation correcte permet à la Cour de trancher le litige qui lui a été soumis.

Je m'efforcerai, entre chacune de ces parties, de les replacer, aussi précisément que possible, dans le contexte global de notre thèse fondamentale.

Monsieur le Président, Messieurs les juges,

I. Les conseils du Tchad vont maintenant aborder la première partie de cette duplique orale. Comme je viens de le dire, elle porte sur la question, que la Partie libyenne présente comme "préalable" du titre initial. De l'avis du Tchad, ce problème ne présente qu'une importance limitée pour identifier la frontière entre les deux pays : le traité de 1955 y pourvoit.

L'insistance de la Libye sur ce point tient au postulat intangible qui constitue l'alpha et l'oméga de ses prétentions : il n'y a pas de frontière, dit la Libye. Dès lors, toute sa stratégie va consister à déplacer le débat de la question du tracé frontalier à celle du titre territorial.

Si l'on accepte le bien fondé du postulat libyen, cela peut paraître logique : faute de frontière conventionnelle, essayons de la déduire du titre territorial. Celui-ci peut résulter soit de traités

mais la Libye affirme qu'il n'en est aucun dont on puisse valablement déduire l'existence d'un tel titre — soit de l'exercice effectif des prérogatives étatiques sur le terrain, étant entendu que les effectivités coloniales indiquent "comment le titre est interprété dans la pratique" (*Différend frontalier*, arrêt, *C.I.J. Recueil 1986*, p. 587, par. 63).

Toutefois, conformément au principe fondamental de l'*uti possidetis*, dont la Libye dit accepter toutes les implications, cette situation doit être appréciée au jour des indépendances, c'est-à-dire en 1951 en ce qui concerne la Libye, en 1960 en ce qui concerne le Tchad. Telle est la signification du fameux "instantané du statut territorial" (*ibid.*, p. 568); il est celui qui existait "à ce moment-là".

2. Ceci, évidemment ne pouvait faire l'affaire de la Partie libyenne : la photo avait été prise le 10 août 1955 et, les Parties en sont d'accord, elle n'a pas été retouchée depuis lors. Au surplus, même en faisant abstraction du traité de 1955 — mais la Libye nous dit, à juste titre, que ce n'est pas possible — mais, même en en faisant abstraction, l'étude de bonne foi des effectivités coloniales avant et durant la période critique 1951-1960 confirme la véracité de cette photographie.

Dès lors, nos contradicteurs sont obligés de "remonter le temps", c'est-à-dire de faire très exactement ce que le principe de l'*uti possidetis* exclut comme l'avait précisé clairement la Chambre de la Cour en 1986 (*C.I.J. Recueil 1986*, p. 568).

3. Monsieur le Président, la thèse libyenne est tellement évidemment incompatible avec ce principe qu'il n'est sans doute pas utile d'entrer dans ce débat très artificiel.

Au surplus, je le répète, il est inutile pour résoudre le problème soumis à la Cour : admettons que rien ne se soit produit depuis 1890; admettons que les revendications ottomanes sur le prétendu *hinterland* de la Tripolitaine soient fondées; admettons même que la Libye aie, via l'Italie, hérité de ses revendications que, pour les besoins de la discussion et contre toute raison, nous assimilerons à des droits. Quelles conséquences en tirer ? Aucune : par le traité de 1955, les deux parties, la Libye indépendante, et la France, dont le Tchad a hérité, ont clairement défini leur frontière commune et, du même coup, les limites de leurs compétences territoriales respectives.

Et elles avaient bien, l'une et l'autre, compétence pour procéder à cette opération, qu'il s'agisse de la confirmation d'une frontière préexistante ou qu'il s'agisse d'une délimitation nouvelle. Nul en effet, pas même la Libye, ne conteste que quelle qu'ait pu être l'étendue des territoires respectifs de la Libye d'une part, de la France d'autre part, ceux-ci étaient voisins et que c'était à ces deux puissances qu'il appartenait d'en déterminer l'étendue et les limites.

Pour paraphraser la Cour dans l'affaire des *Minquiers et des Ecréhous*, attribuer aujourd'hui des effets juridiques à une occupation incertaine et ambiguë — celle des Ottomans, ou des Senoussi, ou des deux —qui a cessé il y a soixante ans "serait aller bien au-delà d'une application raisonnable des considérations de droit" (*C.I.J. Recueil 1953*, p. 57). Et ceci est d'autant plus déraisonnable en l'espèce qu'un traité clair, dont les deux Parties admettent la validité, a défini le titre territorial auquel chacune peut prétendre en même temps qu'il déterminait leur frontière commune. Le professeur Crawford lui-même a du reste clairement admis, jeudi dernier, que : "If a territorial boundary can be discerned which results from a treaty binding on Libya ... Libya accepts that its territory extends no further than that boundary" (CR 93/29, p. 30).

A l'inverse, ne raisonner que sur les titres territoriaux, sans prêter attention aux instruments définissant la frontière — et alors même que ces instruments existent — est extrêmement artificiel et risque fort d'être totalement improductif; comme on l'a décrit :

> "the modes of acquisition concern titles as such and may give little or no help in the problem of determining the precise line that the frontier should follow" (R. Y. Jennings, *The Acquisition of Title to Territory in International Law*, Manchester U. P., 1963, p. 12 et p. 14; Ian Brownlie, *Principles of International Law*, Clarendon Press, Oxford, 1990, p. 124).

4. Il y a donc de nombreuses raisons, Monsieur le Président, pour ne pas entrer dans le débat, inutile et sans intérêt juridique, dans lequel la Partie libyenne tente de nous égarer.

Ce débat, nous avons cependant décidé de ne pas l'esquiver : M. Maghur, dans sa première plaidoirie, s'est plaint que nous ne répondions pas à toutes les théories de la Libye (CR 93/27, p. 17); j'ai dit pourquoi : il nous paraît difficile de prendre certaines d'entre elles au sérieux et elles ne nous avancent guère dans la voie d'une solution, mais, Monsieur le Président, nous ne voulons pas chagriner M. Maghur. Plus sérieusement, il nous est apparu qu'aussi artificiel

que cela soit, nous n'avions rien à redouter de la discussion à laquelle veut se limiter la Libye et qu'aussi lointaine que paraisse la pertinence juridique du problème du titre originaire, une réponse sur ce point contribuerait à "déblayer le terrain"; it would help "clear the deks" pour reprendre les termes utilisés par le juge Dillard dans son opinion individuelle jointe à l'avis sur le *Sahara occidental* (*C. I. J. Recueil 1975*, p. 124).

5. Comme l'a décrit O'Connell, "bad history [makes] bad law" D. P. O'Connell, *International Law*, Stevens, Londres, 1970, p. 409). Or la Partie libyenne réécrit une bien mauvaise histoire, qui n'a que d'assez lointains rapports avec la réalité. En revanche, si l'on colle à cette réalité, les choses sont claires : le titre originaire résidait dans les tribus locales — sans, au demeurant, relever du concept de souveraineté territoriale —, et, en ce qui concerne la bande d'Aouzou, il appartenait aux Toubou, seuls à y être effectivement présents; ce titre a été acquis par la France lorsqu'elle a assuré son emprise effective sur la région revendiquée par la Libye, ce qui était chose faite en 1913; par la suite, la France a consolidé son emprise en agissant constamment à titre de souverain dans cette région.

Monsieur le Président, où en sommes-nous sur ce problème du titre territorial dans cette phase finale des plaidoiries orales ?

Si nous l'avions bien comprise — mais, à force de l'entendre, nous croyons l'avoir comprise — l'argumentation libyenne est en deux étapes :

— dans un premier temps, la Libye s'efforce de vous convaincre que le titre originaire relevait des Senoussi, ou, conjointement, de ceux-ci et des Ottomans au mépris, d'ailleurs de véritables maîtres de la région, les Toubou, que la Partie libyenne tient pour quantité négligeable; le professeur Shaw fera justice de ces assertions et analysera, sous un angle juridique, la situation réelle prévalant à la veille de l'arrivée des Français;

— dans un second temps, la Libye voudrait vous persuader que ce titre territorial composite est passé à l'Italie d'abord, à la Libye ensuite; ceci suppose que les titulaires de ce titre — qui, je le rappelle, engloberait tout le BET jusqu'au 15° parallèle nord si l'on suit la Libye —, l'aient maintenu en agissant effectivement, à ce titre de souverains, sur ces 600 000 kilomètres carrés et

qu'ils n'aient pas renoncé à leurs prétendus droits d'une autre manière. Le professeur Higgins montrera que, celui-ci a, en droit, disparu au profit de la France sans que, pour autant l'on doive postuler le caractère de *terra nullius* de la région considérée. Le professeur Cassese lui succédera et, comme la Partie libyenne nous y a invités (voir CR 93/29, p. 17 et 67), il comparera les effectivités coloniales françaises à celles des entités que la Libye présente comme concurrentes de la France ou, plus exactement, à leurs ineffectivités totales, à partir, en tout cas, de 1913. Le professeur Cot viendra ensuite faire très brièvement le point sur la question des cartes.

Monsieur le Président, Messieurs les Juges, vous aurez donc droit ce matin à un véritable ballet des conseils du Tchad !

Monsieur le Président, Messieurs les Juges, je vous remercie de votre attention et je vous demande de bien vouloir donner la parole au professeur Malcolm Shaw.

The PRESIDENT: Thank you very much. Professor Shaw.

Mr. SHAW:

Original title

Mr. President, Members of the Court, Libya continues to insist upon the centrality of Ottoman and Senoussi claims to the presentation of its case before you. As Professor Bowett emphasized last Thursday,

> "quite separately from any claim or title inherited from Italy, Libya has inherited a separate but equally valid title from the Senoussi and the Ottoman Empire to all that territory which, prior to 1919, had not been effectively claimed by France" (CR 93/29, p. 65).

To the doctrine of "shared sovereignty" is now added the doctrine of "separate but equal". And Mr. Maghur noted on 6 July that the Senoussi-Ottoman relationship constituted "a major element of proof establishing Libya's title to the borderlands" (CR 93/27, p. 19).

Professor Cassese will later address the Court on the nature of Ottoman *effectivités* in the

region and will compare them with those exercised by the French. I seek, however, to respond to some of the comments made by Libyan counsel in the second round of oral argument.

Ottoman Shared Sovereignty

It is, of course, noticeable that Libya's claims with regard to original title continue to focus upon the concept of shared sovereignty and not upon Ottoman title alone achieved by its own efforts. There are no doubt good reasons for this. But it has led Libya to weave some rather interesting patterns. During the first round of oral argument, Chad sought to raise some queries about the nature of what in the Libyan submissions read before the Court by the Libyan Agent last Thursday is terms "community of title between the title of the indigenous peoples and rights and titles of the Ottoman Empire" (CR 93/29, p. 71). Libyan counsel, however, were unable to define, elucidate or explain this curious but for Libya crucial concept. It was suggested to us that we had reduced everything to a "menu fixe" of federation, condominium and protectorate (CR 93/29, p. 19). but that was all that the restaurant provided. It was not for Chad to provide ever more exotic legal justifications for Libyan assertions over and above those placed expressly on the menu by the party responsible. It was for Libya to justify its assertions in law. Have they done so?

Reference was made in the express context of protectorates to the British Foreign Jurisdiction Act of 1890, which provided that *jurisdiction* "within divers foreign countries" could be acquired by the Crown by "treaty, capitulation, grant, usage, sufferance and other lawful means". But this elucidation of the grounds for acquisition of jurisdiction appears hardly relevant to an analysis of the creation and structure of protectorates under international law. Indeed the term "protectorate" does not appear in this piece of legislation. The implication that protectorates could be created informally, however, is clearly wrong. I need only quote from Lindley's classic work, *The Acquisition and Government of Backward Territory in International Law*, 1926, page 203:

> "The necessary and sufficient condition for the setting up of a protectorate is the conclusion of an agreement with the local independent government of chief.

Of course, it is true that Professor Crawford in the first round of oral argument did assert that one could look at the situation in the area in 1912 either in terms of a partnership (specifically

referring to protectorates, federations and condominia) or as a coalescing of allegiance, administration and social organization (CR 93/19, p. 60). One waited for the legal analysis to follow. It did not. No attempt to prove the existence of these concepts as known arrangements in either international law or constitutional law was seriously attempted. Unfortunately, Professor Crawford did not return to this theme in the second round, except for a brief reference to the *Lighthouses in Crete and Samos* case (1937, *P.C.I.J., Series A/B, No. 17*). But that case concerned not the creation of sovereign territorial links by amalgamation of powers, rather an examination of the extent of autonomy granted to local administrations by the accepted authority of an accepted sovereign unit. The same powers granted specifically by governmental authority to an undisputed unit of that State cannot be used in order to construct a sovereign arrangement out of units acknowledged to be separate in the absence of formal arrangements.

The issue really is this. Within any given sovereign State, authorities and powers may be divided and apportioned. By the same token authorities and powers may be divided and apportioned. By the same token sovereign State may relinquish some of the attributes of sovereignty to an international body. But protectorates and condominia in international law cannot be established upon the basis solely of haphazard arrangements in the absence of any clear written evidence by any of the parties concerned. Territorial sovereignty by coalescence of powers is a confusion concept and one that cannot be sustained simply by assertion.

Libya was put to the proof. Libya was unable to establish the existence of such an arrangement. Co-operation against a common enemy, which is what basically happened, is really not sufficient.

Libya has made much of the Ottoman hinterland claim of 1890. We were accused of an unbalanced and unilateral assessment and my comment that the doctrine of the hinterland was at best controversial and gave no rights seems to have been referred to in disapproving tones (CR 93/29, p. 18). However, Professor Crawford repeated that the hinterland doctrine did not constitute an independent basis of title and he is of course correct. He notes that the Ottoman claim was made publicly as a *claim* to sovereignty (I emphasize the term "claim") and co-existed with social and religious links with people in the area. The latter element is of course controversial, but neither point

is determinative. However, there is an important difference between the Ottoman hinterland claim and the claims made with regard to an Algerian and an Egyptian hinterland on either side of Tripolitania, referred to on several occasions by Libya, and that was that the latter two claims were internationally recognized, thus establishing rights at least as far as the recognizing States were concerned and not mere claims. The Ottoman claim of 1890 as I emphasized in my earlier presentation was not only not internationally recognized, but provoked protest (CR 93/24, p. 11).

The Senoussi Order

I turn to a consideration of Libyan assertions with regard to the Senoussi Order. Mr. President, Members of the Court, I would like to take this opportunity to clarify frankly Chad's position as to the legal characteristics of the Senoussi and the rights they held. In our Memorial, we stated that the Senoussi exercised sovereign rights with regard to the BET (MC, p. 254). To have such rights within the territory is, of course, not the same as having territorial title over a territory which can be passed on to others through an indeterminate form of State succession. But in any event, the fact is that as we continued our researches, we began to understand better the spiritual, as opposed to the temporal nature of Senoussi structures and activity in the BET. And this led us to conclude in our Counter-memorial that "Les Senoussistes n'exerçaint donc aucune forme d'authorité civile ou administrative sur les populations indigènes" (CMC, para. 5.100).

We do not deny that the Senoussi Order was a religious movement with a powerful message and one that was conveyed with missionary zeal across northern and central Africa. We do not deny that the Senoussi exercised at certain times and at certain points an educational function. Nor do we deny that they had a significant role at times in intra-African commerce, including trading in arms and slaves. We fully accept that Senoussi did move across northern and central Africa and establish *Zawiyas* in which religious and trading activities took place. What, however, is not sustainable is that such activities established territorial sovereignty for a group that Libya itself accepts "was essentially a revivalist movement in Islam" (ML, para. 3.49). Professor Dolzer placed before the Court once again the map of Senoussi presence across the northern and central Africa. Was Libya suggesting that the Senoussi possessed territorial title wherever such presence or *zawiyas* were to be

found? Surely not. but if not, how are we to judge which *zawiyas* gave rise to title to territory and which did not? Some criteria must have been in mind of the Libyan counsel. If not, the conclusion is one that we would accept: that is, the Senoussi operated at a certain time at a certain number of locations and had a variable local impact. Indeed, each *zawiya* existed on its own without affecting the pre-existing rights of the surrounding indigenous peoples. As Libyan expert evidence emphasizes, the *zawiyas* were "virtually autonomous units" (RL, Vol. 2, Ann. No. 3, p. 11). Thus one cannot artificially colour in the vast gaps between each individual *zawiya* and alleged territorial sovereignty, whether alone or in partnership.

Professor Dolzer referred to my citation of Evans-Pritchard's work on the Senoussi. It will be remembered that Evans-Pritchard referred to the crude social and political organization of the Order and stressed that its administrative machinery was at no time adequate for effective control over such wide domains (CR 93/24, pp. 12-13). Professor Dolzer told the Court that the Evans-Pritchard had also written of the development of Senoussia into a political organization on the basis of identification with the tribal system of the Beduin, but the learned author was at that point referring to the situation on the ground in Cyrenaica. We do not deny that the Senoussi established in that region a large degree of control. But not in the BET, where the Senoussi were weak and certainly did not exercise control over tribes such as the Toubou.

I wish at this stage to make one further brief point. Somewhat to our surprise, Libyan counsel again referred to the Bonnel de Mezières episode (CR 93/29, p. 41). As we have explained during the first round of oral hearings, France sought to mitigate Senoussi hostility particularly in Waddai and requested a French official in Cairo, de Mezières, to seek an arrangement with the Senoussi and Koufra on the basis of respect for some of the customs of the Order (ML, Vol. 3, p. 280). That official, as comes out starkly and forcefully from the French documentation provided, exceeded his instructions and was accordingly reprimanded and recalled for his post (CR 93/24, pp. 29-31). If the episode demonstrates anything, it is that the French were very far from acknowledging any Senoussi claimed territorial title.

Professor Dolzer sought again to convince the Court that links of territorial title bound the Ottoman Empire and the Senoussi Order. This is of course important to the Libyan thesis as a way

of remedying the absence of territorial title clearly vesting in either of those components individually. Unfortunately for the Libyan argument, evidence of such links in the sense used in the *Western Sahara* case of links having a relevance in the context of territorial title, is truly meagre. Professor Dolzer refers to an incident where a Turkish officer was asked by the Senoussi of Koufra to fly a Turkish flag at Ain Galakka in the BET (CR 93/29, p. 41). However, Ricciardi demonstrates that the Senoussi present at that place in 1911 refused to permit the Turks under Captain Rifki to station their forces there thus forcing the Turks to establish a post nearby ("Title to the Aozou Strip", *17 Yale Journal of International Law*, 1992, pp. 352-353). In reality, the relations between the Turks and the Senoussi were ones of mutual suspicion and at times of hostility. As the French drew nearer to the BET, some co-operation did indeed take place but to characterize this as amounting to ties of territorial sovereignty is far off the mark. We have already demonstrated that the much higher level of ties respecting Morocco in the *Sahara* case was simply not matched by the Turks here while the level of ties that existed with Morocco were in any event not sufficient to amount to territorial ties (CR 93/24, pp. 14-16). Mr. Maghur accused us in particular of ignoring "the fact that the Senoussi paid allegiance to the Caliph". Professor Dolzer spoke in identical terms on 8 July (CR 93/29, p. 42). We were referred in particular to expert analysis annexed to Libya's Reply (CR 93/27, p. 19). However, that analysis referred to the attempts of the later Ottoman sultans, particularly Abdulhamid II, to revive the concept of the Caliphate and their entitlement to that title as a legitimizing factor. It was specifically noted "the Sanoussi Order viewed this development with decidedly mixed feelings because it did not accept the caliphal status of the Ottoman sultan" (RL, Vol. 2, Ann. No. 3, p. 3).

The Indigenous peoples

I turn at this point to address the Court on a subject of some centrality. As professor Bowett noted on 22 June, "the one constant in the changing scene" is the title of the various tribes (CR 93/20, p. 63). Libya has constantly sought to portray the indigenous peoples living in the BET (primarily the Tea and Daza branches of the Toubou people) as simply "Senoussi peoples". I note that Professor Crawford continued with this tactic on 8 July, on two separate occasions (CR 93/20,

pp. 41 and 15). Professor Dolzer in contrast with his first pleading was a little more modest and spoke of the tribes as "organized and led by the Senoussi" (*ibid.*, p. 43). However, Mr. President and Members of the Court, what was really striking was the manner in which Professor Dolzer sought to deal with the question of the status of the tribes. Referring to my conclusion upon the basis of evidence that the Toubou were never organized as a centrally controlled group but functioned on the basis of loosely constructed and independent clans, Professor Dolzer declared that the French Government had made an agreement with the Ajir Tuareg in 1864 and asked "Are the Toubou so different because they are organized into clans? Surely, the Court does not want to open the door to legal assertions based on quibbling about the complexities of tribal organizations in the borderlands" (*ibid.*, p. 42). This is an unusual statement for two reasons in particular. First, the fact that the status of local tribes is far from a casual matter in the context of international law and title to territory is well evidenced in the *Western Sahara* case.

The Second point is that analysing the precise structure of authority within a tribe is certainly not quibbling about complexities. On the contrary, it is at the very heart of territorial title under international law in such situations. That is why the Court in *Western Sahara* made the famous statement in paragraph 80 that it did. It did not say that all groups or tribes had territorial sovereignty, but only those that were socially and politically organized. We cannot regard that as a slip of the tongue. It was a deliberate statement and must be taken as such and applied as such. That is why Chad made such efforts to analyse the nature and structure of the Toubou people. Chad came to the conclusion upon the best evidence that the reality of Toubou life was that it was founded upon the independence of loosely organized clans that were of constantly shifting pattern in a hostile and sparsely populated environment. As Chapelle concluded, "Le toubou vit donc dans le cadre de sa parenté généalogique et non dans le cadre des tribus, des fractions, des cantons et autres découpages socio-administratifs" (*Le peuple tchadien*, L'Harmattan, 1986, p. 167). One has to acknowledge fairly the reality and apply this to the juridical analysis performed by the Court. Nevertheless, the indigenous people certainly possessed the rights over the territory.

But, Mr. President, Professor Dolzer was hesitant in his expressions for a particular reason. To acknowledge the capacity of the Toubou to possess territorial tile as he was apparently hinting at,

raises starkly the question of the relationship between the people and the Senoussi. If the Toubou held territorial title, where did this leave the Senoussi Order? The answer, of course, is that the relationship between the indigenous people and the Senoussi Order was one of important, but not exclusive, religious influence. The Senoussi missionaries did have an impact during the early years of this century that they were present in the BET, but as we noted in oral argument, the moment that Senoussi envoys began to seek to interfere with the administration of justice in the Tibesti, they were recalled (CR 93/24, p. 19). This constitutes a clear example of the fact that although the Senoussi had a presence in the Tibesti at that particular time, they were not permitted to intervene within administrative matters beyond their immediate religious concern. Other examples could be provided and the verbatim will show some citations (see, for example, Chapelle, *Les nomades noirs du Sahara*, L'Harmattan, 1982, p. 378 and Zeltner, *Les Pays du Tchad dans la tourmente 1890-1903*, L'Harmattan, 1988, p. 265).

Mr. President, it is curiously selective to discuss in such detail the Senoussi Order and then to dismiss analysis of the Toubou, the indigenous people, as "quibbling about the complexities of tribal organization".

The fact is that the Senoussi and the Turks came and went within a short time. They left variable traces, but the Libyan argument that ties of territorial sovereignty were established simply cannot be sustained.

The conclusion is simply that the indigenous peoples, sparsely spread in loose clans across an inhospitable landscape maintained their independence from Turks and Senoussi alike. They were not part of some shared sovereignty arrangements nor even one component within some hypothetical coalescence. They could not meet the criteria laid down by the Court in the *Western Sahara* case for territorial title under international law. Not every group could conform with the definition given, otherwise there would not have been any point to that definition and the reality speaks for itself. But the reality is also that these peoples have not disappeared. They never were "Senoussi tribes" nor are they now "Libyan peoples".

Mr. President, Members of the Court, I thank you very much for your kind attention and would ask you now to call upon Professor Higgins.

The PRESIDENT: Thank you very much, Professor Shaw. Professor Higgins.

FRENCH COLONIAL TITLE

Mrs. HIGGINS: Mr. President, Members of the Court. My task in this corps de ballet is to speak to you on French colonial title and what I would like to do this morning is to try to see what really divides the Parties on this point. To do that, it is necessary first to clear away what I will term the "mere advocacy" points. So I begin with that preliminary task.

It has been a point of advocacy persistently to misrepresent Chad's legal position on a cluster of issues related to legal title and I will take three brief examples. First example, Professor Crawford said that Chad "no longer argue[s] that spheres of influence are equivalent to territorial title" (*ibid.*, p. 10). I am sure that the Court is fully aware that Chad has from the start made clear that spheres of influence were not equivalent to territorial title. In every phase of the written proceedings we have said this. In the Memorial, for example, we said:

> "Un traité établissant une sphère d'influence ne suffisait donc pas à l'acquisition d'un titre colonial qui ne pouvait être acquis que par la conclusion d'un accord avec les chefs locaux ou par l'exercice effectif et continu d'actes de souveraineté." (MC, p. 61, para. 55.)

We made clear there, and in our written Reply, that "un traité établissant une sphère d'influence ne créait pas un titre suffisant à la souveraineté mais consitutuait un simple 'pas' vers celle-ci", and we referred to literature on how those steps might be taken (Reply, para. 4.08). *Effectivités* obviously have a legal importance in that connection. And we also listed in our Reply other spheres of influence lines in Africa that had developed into international boundaries by this route (Reply, p. 64).

5. Second example, it is not correct to say that we have changed our view on whether the territory that is now Chad was at the time of the French arrival *terra nullius*. Professor Crawford stated that "no longer [is it] inferred that the borderlands were not *terra nullius*" (CR 93/29, p. 10). There never has been any such inference. Indeed as Judge Ammoun remained us in his separate opinion in the *Western Sahara* case (*I.C.J. Reports 1986* p. 85-86), Vattel long ago defined *terra nullius* as a land empty of inhabitants. This was clearly not the case in Chad in 1899 and we have never suggested it was.

6. Third example, it is not correct, either, that Chad has treated the Senoussi as having no rights in international law, or being "outside the law of nations" (CR 93/29, p. 40). We have clearly said in our Memorial that:

> "Ces traités, qui déterminaient des sphères d'influence, ne remettaint en principe pas en question les droits appartenant aux dirigeants indigènes." (MC, p. 61.)

7. Mr. President, this does *not* place the tribes outside the law of nations — it is international law which recognizes these rights and demands their protection. That requirement of international law is increasingly recognized in diverse jurisdictions around the world, which increasingly recognized in diverse jurisdictions around the world, which in their case-law regarding claims by indigenous peoples frequently refer to the relevant principles of international law.

8. So on the propositions that spheres of influence do not of themselves give title, that Chad was not *terra nullius* at the time of French colonization, and that indigenous peoples are entitled to the protection of international law, the Parties in fact have always been in agreement. These really are common starting-points. Why then has Libya been so reluctant to take "Yes" for an answer on these points? It is because it is easier to debate non-existent differences on these points than to address the *real* issue, namely: what are the legal consequences that flow from the common starting-points? But *that* is what we should be trying to assist the Court with an it is to that task that I now turn.

9. So let me take each of these common starting-points. And I will take them in reverse order.

10. I turn first to the starting-point that the 1899 line was a boundary marking only the limit to two spheres of influence. Both sides are agreed that in principle *effectivités* behind the line, establishing title, would be needed for that boundary to come to represent an international frontier. The difference between the Parties are these: Libya disputes the relative weight of French and Ottoman *effectivités*, and says that in any event, it does not matter what *effectivités* the French can show, they could never as a matter of law acquire title. And of course there are differences between the Parties about the opposability of the 1919 line, even as it chanted form a sphere of influence line into an international frontier.

11. What are the relevant differences between the Parties flowing from the common

starting-point that indigenous peoples are entitled to the protection of law? I may summarize it this way. Libya says the Senoussi were the repository of the rights of the indigenous peoples; and that these rights were rights of full international sovereignty and title; and that if this is not recognized, then indigenous peoples remain "outside the law of nations".

12. In its Memorial, when observing that treaties determining spheres of influence did not in principle call in question the rights of indigenous leaders, Chad referred to: "L'existence de tels droits dépendeant de l'existence d'une communauté politique et sociale, locale et organisée." (MC, p. 61.) And Professor Shaw has just addressed you to show that the Senoussi were *not* an organized political community and — even in the various permutations of parties by which Libya seeks to avoid this reality — they were not the repositories of territorial title. They were the bearers of spiritual rights. Accordingly, they had no right, protected by international law, to pass title to the whole of Chad north of the 15th parallel to Italy, and in turn to Libya. It is not because indigenous peoples are "beyond the law of nations", but because of the particular character of the Senoussi.

13. But we say further: even if the Senoussi had been politically based tribes, rather than a brotherhood functioning within a religious structure, that would not have prevented the acquisition of colonial title by France. In the first place, they were not in the BET at the time when France, from 1913 onwards, was making good its effective occupation. The members of the Senoussi Order had gone to Libya and the references are again provided in the Verbatims (MC, pp. 246 *et seq.*; CMC, paras. 5.147-5.148 and 6.72-6.73).

14. But this still did not make the territory *terra nullius*, because important indigenous peoples, notably the Toubou, remained in place. And further, by law of the time, French military action followed by civil administration would have founded international, colonial, title — though international law would continue to require respect for the proprietary rights of the local leaders, and any agreements they had entered into.

15. Professor Crawford contends that the Court's Advisory Opinion in 1975 means that because the Senoussi brotherhood were in the prior period present, with their own rights, *it was they who had international title*. He cites nothing in the case to support this thesis, and there is no finding in the *Western Sahara* case that sustains it. Once more, the Court's words, no doubt

carefully fashioned to answer the questions it had to answer, have been inflated to bear all sorts of means. First Professor Crawford says "the tribes were Senoussi", and then he says "no distinction can be made between the Senoussi and the local tribes" (CR 93/29, p. 14). Mr. President, this is like saying "French people are Catholic; therefore no distinction can be made between Catholics and French." He proceeds from there to say that to deny that the Senoussi had international title "is tantamount to saying that the territory was *terra nullius*" (*ibid.*).

16. It is no such thing.

17. *Western Sahara* tells us that territories were not to be treated as empty territories, which could be acquired by a single act of peaceful occupation, when socially and politically organized tribes lived there. It does *not* tell us that every tribe had international sovereignty. Indeed, that goes quite contrary to the sense of *Western Sahara*. And as Professor Jennings, as he then was, has written: "Natives living under a tribal organization were not regarded as a State for this purpose." (*The Acquisition of Territory in International Law*, at p. 20.)

18. Mr. President, Members of the Court, it is a welcome phenomenon that all around the world nations and their courts are becoming increasingly sensitive to the dignity and rights of indigenous peoples. The invoke international law as requiring them to reach this conclusion. But they have not concluded that, as a consequence, these peoples had international sovereignty and the colonial title to the territory was thus never secured. The recent important Australian case of *Mabo and Others* v. *State of Queensland* (107 A.L.R. (1992) 1) — which has attracted widespread attention — illustrates the point. The Supreme Court of Queensland, exercising federal jurisdiction, there looked carefully at the *Western Sahara* opinion. It also noted that Professor O'Connell in the second edition of his treaties *International Law* had pointed to the distinction between acquisition of international title to territory and the question of acquired rights (107 A.L.R. 1 at 31). They noted further that Rober-Wray, the leading authority on *Commonwealth and Colonial Law*, had written "The ownership of the country is radically different from ownership of the land: the former can belong only to the sovereign, the latter to anyone." (P. 625.)

19. Accordingly, the aboriginals — or to be more precise, the Merriam people — had (and were held to have retained) title to certain lands (the Merriam Islands), while the Crown has secured

title to the Australian colonies. The recognition of the continuation of the native rights did not lead to a consequence of loss of, or retrospective invalidation of, colonial title.

20. I turn now to the third common starting-point, that the territory was not a *terra nullius*. What, then, are the real legal difficulties that divide us here? Libya says that in a territory that was inhabited, in the period 1910 to 1913 title could only be acquired by treaty with local leaders. It says that this is what the International Court decided in 1975 in the *Western Sahara* case. Chad says that is not what the Court decided in the *Western Sahara* case — it decided, in answer to particular questions and issues before it, that the territory of Western Sahara was not *terra nullius*; that often in those circumstances colonial title was sought through agreements with local leaders; that Spain had made such agreements; and that such agreements were not to be treated as of no legal consequence. And I will of course not repeat my submissions on this.

21. Professor Crawford last Thursday did not really answer our detailed analysis. Instead, repeating Libya

s views that in 1975 the Court determined that in an inhabited territory, title could never have been acquired other than through local treaty, he said the Court "said this not once but three times", and he made reference to the three passages (CR 93/29, p. 12).

22. Mr. President, with your permission let us look just once more at those three passages. They are all conveniently located and cited in the Verbatim Record of last week (CR 93/19, p. 41). The first is from paragraph 79 of the Advisory Opinion, where the Court says:

> "The expression *'terra nullius'* was a legal term of art employed in connection with 'occupation'as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of *peaceably* acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be a *terra nullius* — a territory belonging to no-one — at the time of the *act* alleged to constitute 'occupation' . . ." (Italics added.)

23. Now that Court will note the reference to the means of *peaceably* acquiring sovereignty, and to the *act* constituting occupation — that is to say, a *single* act of occupation. It manifestly was not addressing the issue in our case — whether force, combined with and followed by civil administration, provided an alternative legitimate basis of title from the perspective of law as it stood

at the turn of the century. The Court was in this passage simply saying that where a colonial power hoped to acquire title peacefully through means other than cession, the territory would need to be *terra nullius*.

24. What of the second time that the Court is meant to have pronounced in support of Libya's views? This passage too comes form paragraph 79. and it is where the Court says:

> "In the view of the Court . . . a determination that Western Sahara was a *'terra nullius'* at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'."

Now this citation is definitional. The Court could have said that Western Sahara was not a *terra nullius* in that it was not, Vatel's words, a totally empty territory, with only penguins, or guano droppings. Instead, it chose to define *terra nullius* by reference to the normal way that title would be peacefully acquired. But that, too, does not address *our* problem, nor support Libya's thesis.

25. And what about the third quotation? That is from paragraph 80 of the Advisory Opinion, where the Court says this:

> "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers."

So here the Court, rooting itself carefully in the State practice of the relevant period, tells us that *where there are tribes that have a social and political organization*, acquisition of territory was not *generally considered* as effected through peaceful occupation of a *terra nullius*. Once again, that does not address our different question, nor does it say what Libya would have it say.

26. The Court did not, three times, say that under the law of the time, military occupation never give title. It didn't say it three times, it didn't say it twice, it didn't say it once.

Mr. President, to follow on in the formula of Professor Pellet, I hesitate to stop in the middle of a pirouette but I think that might be a convenient moment for the coffee break.

The PRESIDENT: If you are happily with that, Professor Higgins, yes, we will take it now.

The Court adjourned from 11.20 to 11.35 a.m.

The PRESIDENT: Professor Higgins.

Mrs. HIGGINS:

27. Mr. President, given that in the *Western Sahara* case the Court decided other important issues, but not the issue in *this* case, how should that issue then be answered? Of course, it will only need to be answered at all if the 1955 Treaty is to be regarded as irrelevant. But if it has to be answered, the answer can only be given by the application of the principle of intertemporal law.

28. The intertemporal principle of international law performs a critical function in balancing stability and predictability on the one hand, with needed change and development on the other. Ideas change. The international community develops, striving for a better world, in which all States have equal rights, and the weak are protected against the powerful (whether in Europe, or in Africa). But when we come to judge what was done 90 years ago, we can only judge it — and the legal right that flowed from it — under the law of the time, however repugnant that law might seem today.

29. Professor Crawford said that we have viewed the Court's findings in the *Western Sahara* case as "a dangerous heresy . . . an *ex post facto* intervention by this Court" (CR 93/29, p. 12). But of course, we see the Court's finding differently, and the welcome finding that we see involves no *ex post facto* intervention by the Court. It is solidly rooted in the principles;es of intertemporal law. The Court answered the question "Is the territory of Western Sahara *res nullius*"? Not from the vantage point of 1975, but by looking at the international law *of the time*. How did it do that? And one can see the answer in paragraph 80. There the Court refers to the contemporaneous writings of jurists, and "the State practice of the relevant period". The Court found the writings of the jurists somewhat divided, but the State practice clear.

30. Mr. President, we say that that is the way also to answer our question — namely, whether legal title could in 1913 have been acquired, in a territory inhabited by various indigenous peoples

and religious groups, by military action followed by civil administration.

31. Let us take the jurists of the time. The honest answer is that their writings do not enormously illuminate *our* problem either, because for the most part they are addressing either the acquisition of title in totally empty lands; or conquering territories already belonging to another sovereign power; or discussing situations where there had been agreements with native chiefs who exercised local government; and again, we list in the verbatim the writers of the time (see, for example, *The Collected Papers of John Westlake on Public International Law* (1914); Lawrence, *The Principles of International Law*; Salamon, *L'occupation des territoires sans maitre* (1899); Hall, *A Treatise on International Law* (1924); and Bonfils, *Manuel de droit international public* (1914)).

32. So, as the Court did in paragraph 80 of the Western Sahara case when answering a different question, let us then turn to the State practice of the time. In my pleadings in the first round I explained how, though agreements often were made, title so many territories around the world where indigenous peoples lived was acquired without resort to local treaty. That was part of the reality of the State practice of the time.

33. What often happened was this: where there were competing colonial ambitions, as in Africa, lines delimiting spheres of influence were drawn. The colonial Power then got up to that line — that is to say, made good its claim to sovereignty behind and up to the line — through a variety of means. Where there were very well organized leadership structures, and especially when these were tied to discernible territorial areas, it often was both sensible and desirable to deal with them through arrangements. The arrangements in New Zealand to which Professor Crawford referred (CR 93/29, p. 12) — and which, of course, were part of the background of the Waitangi Treaty — were just such an example.

34. But, looking at the realities of the State practice of the time, various points may be noted. First, there were not always treaties made at all. And in my last pleadings I identified some African and other countries, and some parts of African countries, where colonial title had not been treaty based. Second, even where treaties were made — and this is an important point, Mr. President — the subject-matter of the treaties was often not the transfer of title *at all*. Treaties were often about

variety of matters of mutual accommodation. Third, the sphere of influence lines as agreed between the European Powers were often not co-terminous with the territorial influence of a particular tribe. This is particularly true of nomadic tribes. For instance, the Touareg roam freely through a great part of the Sahara. Treaties with tribes, when dealing with territorial matters, rarely provided agreed transfer of title neatly falling within and up to the artificial boundaries drawn by the colonial Powers.

35. We should not be deluded, Mr. President, Members of the Court, into a new form of received wisdom that treats local treaties as the acceptable face of colonialism, in contrast with other forms of acquisition of title. Neither content, nor their geographic scope, nor their geographic scope, nor the circumstances in which they were concluded, would merit that.

36. I can illustrate that point by reference to Ghana. The coastal colony of Ghana was established by a patchwork of treaties and events over time. There was an agreement as to the end of slave trading. Port facilities were then secured. Then missionaries were sent in. And trading links with the indigenous people followed. Thus did colonial *effectivités* get established. Consequently the Ashanti in the hinterland raided the coastal colony. The British then used force to establish themselves in Ashantiland. And although at the end of the day there was a protectorate treaty, we should have no illusions but that it was a treaty imposed by force. And, in due course, the protectorate became merged with other protectorate and colonies in the region to form the colony of the Gold Coast.

37. Today we all are appalled at what was done in the name of colonialism. But we delude ourselves if we think that we can now deem territories acquired by local treaty as "politically correct", and reject colonial title acquired by other means. State practice on the ground did not in reality fall into these two neat categories. Military action often let to treaties. And, conversely, treaties were often entered into to avoid military action, and the likely consequences of preponderant military power. And frequently treaties entered into were treated by the colonial Powers as mere scraps of paper.

38. Mr. President, Members of the Court, why do we continue to say that French title rested on what we have termed "military occupation" — military action, followed by civilian administration? Why do we not accept Professor Bowett's demand — that we choose between *res*

nullius and treaties on the one hand, and military conquest on the other? It would not be troublesome for us to mail our colours to the mast of conquest in spite of the hurdles that Libya has tried to erect for us if we should accept that invitation. Those perceived impediments present no difficulty for Chad. What insuperable problems do Libya's counsel seek to identify in respect of conquest? They say, in the first place, that conquest itself did not pass title, but that formal annexation was also required. And then they say that no conquest in fact took place until after 1919, by which time it was illegal. A couple of brief comments on each point.

39. We can agree with Professor Crawford that there are different views among the writers of the time as to whether annexation was needed to pass title after conquest, although we believe that the greater weight of opinion is that annexation was — to use a now familiar phrase in this case — declaratory of what had happened, rather than constitutive of title. Title was, in international law, always dependent on *effectivités*, upon realities, and not upon formalities. Again, is there to be a retrospective audit to see whether all title around the world based on conquest was followed by a formal instrument of annexation? But in any event, France proclaimed the taking into possession of the territory that is now Chad. This is clearly evidenced in the French archives (see MC, Ann. 116) and Professor Cassese will refer to this again.

40. As for the claim that conquest didn't occur until after 1919, by which time it was too late, legally speaking, Chad believes it has shown otherwise, both on the facts and on the law. France had certainly by 1919 military secured Chad — and the fact that sporadic raids occurred beyond that date does not "undo" that reality. Such raids were indeed occasional, and rapidly bought under control. As for Libya's contingent argument that Article X of the League Covenant, as well as the Kellogg-Briand Pact, outlawed colonial title that involved use of the military instrument — well, Mr. President, we believe we have fully responded to this in the written pleadings and again in the first round of oral argument. No response to our analysis of the law has been forthcoming from Libya — only repeated invocation of the iniquities of colonialism.

41. If the arguments on conquest present no problem, why do we then not simply accept the invitation to categorize French title as conquest? Mr. President, Members of the Court, we do not do so because we believe it is wrong in law. Conquest is the term used in international law to describe

the military defeat by one State of another State, or of the territory of another State. By reference to the law of the time, and what the Court has said in the *Western Sahara* case, there was no independent Senoussi State, nor did the BET belong to the Ottomans.

42. We stand by our analysis based on the intertemporal law of the time. The State practice of the time — here as in the *Western Sahara* case — will point us to the realities on which the international law of the time was based. And the realities were that here — as elsewhere in Africa, and also in other parts of the world — title was made good up to sphere of influence lines through a mixture of force and civil administration. The situation in Chad falls exactly within the description of the learned author of *The Acquisition of Territory in International Law*: in territory where there were tribes not regarded at the time as forming a State, he said, "force, even considerable force, might be used for the establishment of the settlement [and] the result in law was not conquest but occupation" (p. 20).

43. Mr. President, Members of the Court, Chad, like any country, is entitled to rely on the application of the international law principle that a juridical fact is to be appreciated in the light of the law contemporary with it. Libya tells us that she accepts this principle but that it doesn't apply — just as she tells us that she accepts the *uti possidetis* principle, but that too doesn't apply. Both these principles also serve the important function of providing stability for Africa, and this need cannot be dismissed with amusing quips about apocalyptic visions. In my previous oral pleadings on this point I pointed to the implications for Africa and beyond, if Libya's argument was accepted that there had never been good colonial title if it had been secured by military occupation. Professor Crawford said that the doctrines of *debellatio*, conquest and consolidation would protect against instability. But *debellatio*, which entails the total suppression of the State, is inapplicable to the facts of how colonial title was acquired in those African and other countries at threat form the Libyan analysis of the law. They were, exactly, *not* States at the moment of colonial title. No more does conquest apply, for the reasons I have already just analysed. And as for consolidation, we were referred to some previous pleadings of Professor Bowett (CR 93/14-19) for an explanation. But on checking these the paragraphs do not *at all* address the facts as they apply to these African countries. So Libya's attempt to push Chad off the high wire, while providing a safety net for the rest of

Africa, simply doesn't work.

44. Libya's other response to the destabilizing effects of its proposal that only treaty based title be recognized, was equally unpersuasive. Professor Crawford said simply that each case would fall to be dealt with individually; and that Australia "would be protected by Article 59" of the Statute (CR 93/29, 11). When the International Court pronounces rules of international law, those rules have an importance for every State that my be, or is, in a comparable position. That follows from the Court's authority on the one hand, and the consistency of its jurisprudence on the other. Mr. President, it is astonishing for a Party that has put so much of its case on certain dicta in the *Western Sahara* Opinion, to then tell you that what you decide in this case will have no significance for third parties, because they will be protected by Article 59.

45. In any event, we are not talking here about possible future litigation, but about the likely political, diplomatic and military consequences of declaring invalid *ab initio* — and thus for the successors too — all colonial title secured by military occupation. And it was this mischief that the Cairo resolution of 1964 was directed against. Chad does not say, as counsel for Libya seemed to think, that the OAU forbids States from maintaining disputes. We do say that if no mention was made by either Party of a boundary dispute at the time, the implicating is that no dispute then existed. And we further say that the 1964 resolution directed that disputes be resolved by peaceful means — not by occupying what you later claimed you were entitled to. And, critically, through its acceptance of the colonial boundaries, the Cairo resolution specifically directed that any disputes that might indeed still occur would not be resolved by going all the way back to original colonial title.

46. This was the solution that Africa itself chose as in its best interests. Self-determination, stability, the avoidance of wars and hostility with neighbours, the end of colonialism, these are the real friends of Africa, not attempts to undo what has gone before.

47. Mr. President, Members of the Court, all of these issues are pertinent only if the Court decide that Libya's web of arguments have and real relevance. Our firm belief is that they have not, and that the 1955 Treaty is the legal beginning and end of the case. But, in order to dispose of Libya's arguments, we continue for the moment with out analysis of issues relating to original title: and for that purpose, in thanking you for your attention, I would ask you to call Professor Cassesse.

The PRESIDENT: Thank you very much Professor Higgins. Professor Cassese.

M. CASSESE:

LES EFFECTIVITES

I. Remarque Liminaire

Monsieur le Président, Messieurs les juges,

Permettez-moi tout d'abord une remarque liminaire et générale. Comme vous le savez, c'est la première fois que je plaide devant cette haute juridiction. J'ai donc suivi les débats avec l'engouement du néophyte. J'ai été frappé par les capacités dialectiques et l'éloquence de nos contradicteurs. Dans leurs plaidoiries, ils se sont livrés à un véritable feu d'artifice intellectuel qui force l'admiration.

Leur talent oratoire m'a rappelé ce que disait Thomas Mann du philosophe hongrois György Lukacs : "Un intellectuel de valeur, sans aucun doute. Il a un talent dialectique formidable. Il énonce les arguments les plus abstraits et les plus alambiqués, et vous êtes contraint de lui donner raison *du moins tant que c'est lui qui parle*".

Eh bien, Monsieur le Président, j'ai eu la même impression en écoutant nos contradicteurs. J'ai beaucoup admiré leur talent dialectique; cependant, aussitôt qu'ils se sont tus, toutes leurs apories, leurs omissions, leurs méprises et leurs contradictions sont apparues au grand jour.

Dans cette brève intervention, je me propose donc de mettre à nu certains défauts de leur cuirasse, et je le ferai par rapport à la question des effectivités.

II. Plan de l'exposé

Monsieur le Président, Messieurs les juges, nos contradicteurs nous ont accusés d'utiliser deux poids et deux mesures en ce qui concerne les effectivités ottomanes et françaises sur le BET. Ils nous accusent d'être trop exigeants pour les effectivités ottomanes et, en revanche, trop "laxistes" pour ce qui est des effectivités françaises.

C'est faire preuve d'un bel aplomb : en réalité, c'est à la Partie libyenne qu'on peut retourner le compliment, comme je vais le montrer. Mon propos comportera trois volets.

1) Je commencerai par passer en revue les *critères généraux* d'évaluation des effectivités.

Ce bref, très bref, rappel me paraît nécessaire dans la mesure où la Libye a fait preuve d'un mutisme remarquable sur la question pour mieux adapter le cadre juridique aux besoins de sa cause.

2) Je montrerai ensuite que les velléités d'occupation ottomanes n'ont, à aucun moment, répondu aux exigences d'occupation effective.

3) Enfin, le contraste entre l'intermède ottoman et l'occupation française me permettra de montrer encore une fois que la France, par son emprise effective, paisible et constante, a acquis un titre coutumier sur le Borkou, l'Ennedi et le Tibsti, et ce, avant 1919.

III. Les critères juridiques généraux pour évaluer les effectivités

Soyez rassurés, Messieurs de la Cour : il n'entre pas dans mes intentions, à ce stade avancé des plaidoiries, de procéder à un long exposé sur les principes coutumiers qui, au début de ce siècle, régissaient l'acquisition de territoires par leur possession effective. Ces principes, vous les connaissez. La Libye ne les ignore point : elle se contente d'en faire un usage que par respect pour mes éminents collègues je qualifierai seulement de "s électif".

Permettez-moi donc, pour la clarté de mon propos, de rappeler brièvement cinq éléments, qui constituent la grille d'analyse que je me propose d'utiliser.

Premièrement, l'*effectivité* de l'occupation :

Il faut mais il suffit que la puissance occupante impose, de fa çon continue et pendant une période suffisante, son autorité sur l'ensemble du territoire concerné, sans que, *dans les faits* j'insiste sur ces termes : *dans les faits* l'exclusivit é de cette autorité ne soit mise en cause.

Deuxièmement, l'*animus* :

Il faut que les actes de la puissance occupante témoignent de sa volonté d'établir son autorité souveraine sur la zone en question.

Troisièmement :

Les manifestations d'autorité souveraine ne doivent pas se limiter à une simple présence militaire, mais englober la gamme des actes civils qui vont de pair avec la souveraineté : actes législatifs, perception de l'impôt, administration de la justice, etc.

Quatrièmement :

L'attitude des Etats tiers joue un rôle important : leur reconnaissance est un élément essentiel dans le processus de consolidation des effectivités.

Cinquième et dernière remarque, mais non la moindre :

La jurisprudence internationale a souligné à plusieurs reprises que les conditions auxquelles les manifestations de souveraineté font titre varient en fonction de la région en question. En particulier, les sentences arbitrales bien connues relatives à l'*Ile de Palmas* (*RGDIP* 1935, p. 165), à l'*Ile de Clipperton* (*RSA*, vol. II, p. 1110) et l'arrêt du *Groënland oriental (C.P.I.J. série A/B n° 53)* ont admis que, dans des régions difficiles d'accès et peu peuplées, les critères d'effectivité sont moins exigeants. Cela vaut, en particulier, pour les régions désertiques où l'on ne saurait exiger une *continuité sans faille*, tant au niveau territorial qu'au niveau temporel, dans l'exercice de la souveraineté.

Voilà, Monsieur le Président, dessinée à grands traits la grille d'analyse qui doit nous permettre de mesurer l'effectivité des occupations qui se sont succédées dans les régions du Borkou, de l'Ennedi et du Tibesti.

IV. L'intermède ottoman

Voyons maintenant comment la présence ottomane, base du titre dont prétend avoir hérité la Libye, résiste à l'analyse.

1) La Libye fait remonter à juillet 1907 le début de la présence ottomane dans le BET (mémoire de la Libye, par. 4.127). Vous vous serez demandé comme moi, Messieurs les juges, à quel événement correspondait cette date. Après quelques recherches, j'ai fini par trouver la réponse. C'est en effet à cette époque que le *derdé*, chef coutumier du Tibesti, se rend à Mourzouk, au Fezzan, pour s'entretenir avec les autorités ottomanes des mesures à prendre en réponse à la poussée française. Il revient à Bardaï, nous dit-on, escorté de quatre soldats, dotés, il est vrai, d'un drapeau turc (mémoire de la Libye, par. 4.127).

Vous pouvez imaginer la scène : cinq hommes, harassés et poussiéreux après un voyage de plusieurs centaines de kilomètres dans le désert, rentrant à Bardaï avec, dans leur paquetage, ce

précieux symbole de la souveraineté ottomane. Voilà, Monsieur le Président, la "prise de possession solennelle" qu'évoquent les conseils libyens. Et c'est à l'installation de cette "garnison substantielle" l'expression est du professeur Dolzer (CR 93/20, p. 22) que nos contradicteurs font remonter les droits que revendique la Libye aujourd'hui.

La scène évoque bien la réalité de la présence ottomane dans la région. Même à son apogée, c'est-à-dire entre l'automne 1911 et le printemps 1912, les documents libyens ne font état que d'un contingent turc de quelques *dizaines* d'hommes regroupés dans quelques postes isolés.

Le professeur Bowett, en parlant des effectivités françaises, a insisté à plusieurs reprises sur le fait qu'on ne pouvait prétendre occuper une région aussi vaste que le BET avec quelques *centaines* d'hommes seulement (CR 93/19, p. 7 et 9). S'il se trouvait à ma place aujourd'hui, il vous dirait certainement qu'a fortiori les maigres effectifs ottomans n'auraient pu suffire.

Certes, je viens de rappeler que, s'agissant d'une région désertique, on ne peut faire montre de la même rigueur que dans une zone plus densément peuplée. Il suffit, comme l'a affirmé Max Huber dans l'affaire de l'*Ile de Palmas*, que la puissance occupante soit "en mesure d'y faire valoir son autorité exclusive" (*RSA*, vol. II, p. 1110).

Toutefois, on est loin du compte pour ce qui est de la présence ottomane : une étude récente a amplement démontré que les chefs locaux qui conservaient leurs propres forces avaient délibérément confiné les maigres forces ottomanes à un simple rôle supplétif, sans leur laisser la possibilité d'exercer les actes de puissance publique qui vont normalement de pair avec la souveraineté. Du reste, en raison de leurs effectifs limités, les Turcs ne seront pas en mesure de s'opposer efficacement ni à la poursuite des actes de pillage ni même aux passages occasionnels de méharistes français (M. Ricciardi, "Title to the Aouzou Strip : A Legal and Historical Analysis", 17 *Yale Journal of International Law* (1992) 301, p. 354).

Il me paraît difficile, dans ces conditions, de parler d'"autorité exclusive" !

La présence turque n'a d'ailleurs guère duré : si elle s'étend sur une période de quatre ans au total, elle n'a atteint une certaine ampleur ce que l'on appelle en physique un *seuil d'observation*, en-deçà duquel les variations sont trop faibles pour être mesurées avec précision que pendant les quelques mois qui précédèrent l'évacuation ottomane de la zone en 1912. C'est bien peu au regard

de près de cinquante ans de colonisation française !

2) Par ailleurs, il s'agissait exclusivement d'une présence militaire. Et cela s'explique aisément : les chefs locaux refusaient toute subordination effective aux Ottomans; ils s'opposaient à ce que les Ottomans exercent un contrôle territorial direct (Ricciardi, *op.cit.*, p. 352-354). Voilà pourquoi la Libye n'a pu apporter le moindre commencement de preuve, ni dans ses écritures, ni dans ses plaidoiries, d'un quelconque acte à caractère civil.

Pour remédier à cette lacune, le professeur Dolzer a eu recours à un raisonnement des plus particuliers. Il déduit le caractère civil de l'occupation turque de ce que l'on ne trouve nulle part mention de combat dans lequel les suppléifs turcs auraient été engagés (CR 93/20, p. 23).
En somme, semble-t-il nous dire, il faut bien que ces pauvres soldats aient fait quelque chose pour tuer le temps; s'ils ne se sont pas battus, c'est donc qu'ils ont admiré la région !

Je n'insisterai pas sur le caractère spacieux de ce raisonnement, Monsieur le Président.

Ici encore, j'entends la voix du professeur Bowett : "Où sont les preuves ?" Certainement pas dans les documents de nos honorables contradicteurs.

3) Il faut enfin faire justice de l'affirmation fantaisiste selon laquelle la France aurait acquiescé à l'occupation ottomane du BET. Dès que la présence turque acquit une certaine consistance, la France s'empressa de réagir, comme en témoigne la vigoureuse protestation par laquelle le colonel Largeau réagit à l'installation de militaires turcs a Ain Galakka :

> "Au nom du Gouvernement de la République, je proteste contre votre présence dans ce pays qui, par des accords diplomatiques rendus publics, rentre dans la sphère d'influence de la France." (Mémoire du Tchad, annexe 83.)

Quant à la prudente expectative observée par les forces françaises, dont la Partie libyenne a fait tant de cas, elle était inspirée par des exigences de haute politique internationale : la France, neutre dans le conflit italo-turc qui faisait rage en Tripolitaine, a préféré s'abstenir de tout acte d'hostilité à l'encontre d'un allié traditionnel. Toutefois, elle a clairement indiqué qu'il ne s'agissait que d'un arrangement temporaire, qui n'engageait en rien sa position quant au fond. La protestation du colonel Largeau était tout à fait précise à ce sujet.

Elle affirmait tout aussi nettement que la France n'était aucunement disposée à tolérer la moindre interférence dans les régions comme l'Ennedi, où son autorité s'exerçait déjà, je cite les mots du colonel Largeau : "Quiconque paraîtra en armes dans ces régions sera traité en ennemi." *(Ibid.)*

Non contente de souligner l'absence de tout titre ottoman, la France fera valoir que le manque de moyens des Turcs ne leur permettait pas d'assurer un contrôle effectif de la région, ce qui laissait les coudées franches aux pillards de toute espèce (lettre du lieutenant-gouverneur du haut-Sénégal Niger, 30 avril 1911 (contre-mémoire du Tchad, annexe 21, p. 2); rapport du capitaine de Barbeyrac, 27 juillet 1911 (contre-mémoire du Tchad, annexe 24); voir aussi *Histoire militaire de l'AEF* (mémoire de la Libye, pièce 26, p. 391 et 422)).

Dans ces conditions, parler de reconnaissance française est singulièrement abusif.

5) En bref, l'intermède ottoman au BET se réduit à fort peu de choses : quelques dizaines d'hommes privés de contrôle effectif sur la région, et confinés à un rôle subalterne par des partenaires méfiants, qui n'ont fait appel à eux que pour faire face à un ennemi dont la venue était imminente. Du reste, tout comme dans le roman de Dino Buzzati, *Le désert des Tartares*, ces maigres troupes durent plier bagages avant même l'arrivée de l'ennemi, lorsque le sultan renonça à la souveraineté sur la Tripolitaine, abandonnant du même coup ses prétentions sur le BET.

V. Les effectivités françaises

J'en arrive ainsi aux effectivités françaises.

Reprenons ensemble la grille d'analyse que j'ai esquissée en commençant : le contraste avec la fantomatique présence ottomane est saisissant.

1) Laissons de côté les comptes d'apothicaire sur les forces militaires qui ont été déployées : cela n'est pas décisif. Ce qui est déterminant, c'est qu'en dépit des escarmouches qui ont marqué les premières années de présence française, l'emprise française dans la région en question n'a jamais été en péril.

A-t-on vu une résistance organisée soustraire certaines parties du territoire à l'autorité

française ? Non.

La France a-t-elle toléré les menées de puissances étrangères ?

Encore une fois, non : les incidents de Jef-Jef et d'Aouzou ont apporté la preuve de sa *détermination* et de sa capacité à imposer son autorité exclusive.

Voilà ce qui compte : même si sa présence militaire a connu quelques éclipses dans le Tibesti, la France a toujours été en mesure de faire valoir ses droits souverains au cours des cinq décennies où elle a été présente dans la région et c'est bien là, Monsieur le Président, ce qui distingue les effectivités françaises de l'éphémère présence turque.

2) Cette continuité confère d'ailleurs un caractère quelque peu dérisoire aux observations libyennes sur le défaut d'*animus possidendi*. Voilà une puissance coloniale qui déploie des troupes dans un territoire, dans lequel elle exerce les fonctions normales de puissance publique.

Peut-on rêver une manifestation plus nette de son *animus possidendi* ? Toutefois, nos honorables contradicteurs s'obstinent à affirmer que non, vraiment, la France n'avait pas l'intention d'étendre sa souveraineté sur la zone en question. A les en croire, le fait qu'elle l'ait occupée pendant près de cinquante ans ne suffirait pas à prouver sa détermination.

Puisqu'il est vraiment nécessaire de prouver l'évidence afin de vaincre un tel scepticisme, je rappellerai, Monsieur le Président, que, dès 1906, la France avait pris des mesures qui montraient sans que le moindre doute soit possible, sa détermination d'occuper progressivement les régions qui se trouvaient dans sa zone d'influence.

En février 1906, en effet, un décret du président de la République française place une série de circonscriptions sous "la haute direction *politique* et *administrative* d'un commissaire général du gouvernement dont la résidence est à Brazzaville". Au nombre de ces circonscriptions, figure notamment le territoire du Tchad, décrit comme :

> "Comprenant au nord de l'Oubangui-Chari l'ensemble des régions placées sous l'influence de la France en vertu de conventions internationales, et ne dépendant pas du territoire de l'Afrique occidentale française. " (BCAF, mars 1906; les italiques sont de nous.)

Ainsi, Monsieur le Président, dès 1906, le Gouvernement français affirmait son intention d'étendre sa souveraineté à l'ensemble de la zone d'influence qui lui avait été reconnue par les accords de 1899.

Cette volonté était étayée par d'autres sources, dont j'ai fait état dans ma plaidoirie du 30 juin (CR 93/24, p. 54-55). Le professeur Bowett indiquait à ce propos qu'il n'avait vu dans ces documents que j'avais cité "aucune référence spécifique au BET" (CR 93/29, p. 51).

Sans doute son attention a-t-elle été prise en défaut : j'ai cité, entre autres, Monsieur le Président, les décrets de 1912 "déterminant les circonscriptions administratives du Borkou-Ennedi" (mémoire du Tchad, annexe 116), décrets auxquels il faut ajouter l'arrêté du 22 mai 1914 (J.O.A.E.F., 1er juin 1914, p. 239); j'ai cité aussi l'arrêté de 1930 rattachant le Tibesti à l'AEF (mémoire du Tchad, annexe 116). La France se serait-elle amusée à modifier le statut administratif des zones en question si elle ne les considérait pas comme soumises à sa souveraineté ?

3) Apparemment, il est aussi nécessaire de mettre les points sur les i en ce qui concerne les *aspects civils* de l'occupation française, puisque le professeur Bowett m'a fait grief de ne pas apporter les preuves de ce que j'avançais.

Messieurs les Membres de la Cour, vous avez pris connaissance des documents soumis par la République du Tchad. Sans doute, à la différence de mon éminent collègue le professeur Bowett, vous rappelez-vous qu'ils contenaient de nombreuses preuves documentaires de l'administration civile du territoire.

Je ne vais donc pas vous en imposer un rappel fastidieux; je me permets de vous renvoyer au mémoire du Tchad, qui illustre la panoplie des actes d'administration civile par laquelle s'est traduite la présence française (mémoire du Tchad, p. 241-302) : par exemple, nominations de chefs de canton (décision du 3 septembre 1935, *JOAEF* du 1er novembre 1935) et d'assesseurs pour les tribunaux indigènes (arrêté du 26 décembre 1930; *JOAEF* du 15 février 1931, et du 7 novembre 1935; *JOAEF* du 15 décembre 1935), allocation d'une indemnité de vie chère aux cadres indigènes de certaines zones (arrêté du 27 mars 1931; *JOAEF* du 1er juin 1931), etc.

Mais le professeur Bowett, décidément difficile à satisfaire, affirme que la mise en place d'une structure administrative ne signifie pas nécessairement que cette administration ait effectivement fonctionné.

Soit. Je lui rappellerai les rapports mensuels et annuels que les chefs de districts envoyaient aux autorités de Fort-Lamy (voir mémoire du Tchad, p. 278-282).

Je lui rappellerai surtout le volumineux *Journal du Poste d'Aouzou* que voici, et que, bien sûr, nous avons produit (mémoire du Tchad, production 41). Ce texte, qui couvre la période 1930-1937, est un document très révélateur. Bien sûr, ce n'est pas une lecture aussi passionnante que celle d'un roman policier, d'autant plus que le chef de poste lui-même ne s'amusait pas du tout, dans cette petite palmeraie perdue au beau milieu du désert.

Chaque soir, le chef de poste enregistrait, avec une écriture menue, et souvent en style télégraphique, les principaux éléments de la journée. Par exemple : la levée des tributs payés par les chefs de villages, le recensement de la population, la convocation et la tenue d'assemblée des chefs de village, le règlement de différends entre indigènes, leur éventuel emprisonnement pour délits de droit commun, etc.

Autant d'actes routiniers dont la banalité même révèle une administration paisible. Voilà, Monsieur le Président, les preuves concrètes et irréfutables de l'exercice de la souveraineté française, que demandait mon éminent collègue le professeur Bowett.

Dois-je vous rappeler, Messieurs de la Cour, qu'en ce qui concerne la présence ottomane, on ne retrouve mention d'*aucun* acte de ce genre dans les milliers de pages présentées à la Cour par la Libye ?

4) J'en arrive ainsi au dernier point de mon analyse, la question de la *reconnaissance des effectivités françaises* par les Etats tiers.

Par les accords de 1919 et 1924, la Grande-Bretagne avait admis les prétentions de la France sur le BET. Quant à l'Italie, j'ai souligné dans ma plaidoirie du 30 juin que les protestations italiennes de la période 1921-1934 ne portaient que sur le titre conventionnel de la France, et qu'elles ne pouvaient affecter la validité du titre coutumier (CR 93/24, p. 59-61).

Bien au contraire, en protestant contre le déploiement des troupes françaises aux abords de la ligne de 1899, l'Italie reconnaissait indirectement l'effectivité de la présence française dans la zone. En effet, c'est cette présence qui est à l'origine des protestations italiennes : une note interne de 1939 indique clairement que ce qui préoccupait l'administration italienne, c'était surtout "la progressive occupation militaire et *l'organisation administrative*" (je dis bien : "l'organisation administrative") de tout le Tibesti par la France (mémoire du Tchad, annexe 132).

Ainsi, l'Italie fut pleinement consciente de l'emprise française sur le Tibesti.

Pouvait-elle empêcher la consolation du titre coutumier par ses protestations ? Dans l'affaire du *Groënland oriental*, la Cour permanente de Justice internationale a répondu par la négative à une question semblable. Après avoir relevé que le Danemark avait exercé des attributions gouvernementales à l'égard du territoire contesté, la Cour a indiqué que :

> "La nature de ces actes du Danemark n'est pas modifiée par les protestations ou réserves que, de temps à autre, formula le Gouvernement norvégien." (*C.P.J.I. série a/B n° 53*, p. 62.)

VI. Conclusion

Monsieur le Président, Messieurs les juges,

Le tour d'horizon auquel je vous ai conviés a mis en lumière l'abîme qui sépare l'éphémère présence ottomane au BET de l'occupation française. D'un côté, une présence très limitée, exclusivement militaire, insuffisante pour assurer un contrôle réel et qui prit fin avec l'abandon de la région par les maigres effectifs ottomans, avant même l'arrivée des Français. De l'autre, une présence continue qui couvre près de cinquante ans, au cours desquels les activités gouvernementales se sont progressivement étoffées.

Cette continuité est à la base du titre coutumier de la France, dont les protestations sporadiques de l'Italie n'ont pu empêcher la consolidation.

Charles De Visscher, orfèvre en matière d'effectivité, a souligné que les effectivités pèsent plus lourd que les protestations lorsque celles-ci ne s'appuient sur aucun titre précis :

"Le droit international n'admet pas qu'à l'abri de protestations simplement formelles un Etat tienne en suspens le statut d'un territoire sur lequel un autre Etat a exercé, de façon et pour une durée suffisante, des activités gouvernementales." (*Les effectivités du droit international public*, Paris, Pedone, p. 190-110.)

Un dernier mot, Monsieur le Président. C'est à la lumière de la *consolidation* du titre coutumier français que doit être appréciée la situation au moment de l'indépendance de la Libye. 1951, vous le savez, est une des dates critiques dans notre affaire.

A ce moment, la Libye se présente sur la scène internationale avec les frontières qu'elle avait héritées de la période coloniale : ni plus, ni moins, comme le montrera demain mon collègue le professeur Tom Franck.

La photo de la Libye indépendante est identique à celle de la veille : les limites territoriales sont inchangées.

La frontière méridionale de la Libye est celle de 1899-1919, car au-delà, les effectivités françaises montrent que le territoire était soumis à l'emprise souveraine de la France.

Je vous remercie, Monsieur le Président, de votre attention et je vous prie de bien vouloir donner la parole à mon collègue Jean-Pierre Cot.

The PRESIDENT: Thank you very much, Professor Cassese.

Professor Cot

M. COT : Monsieur le Président, Messieurs de la Cour, deux mots sur le problème des cartes, ceci pour répondre aux observations et critiques de la Partie libyenne. Je constate, au demeurant, que ces remarques sont peu nombreuses, ce qui me permettra d'être rapide.

Je rappelle en préambule que la Partie tchadienne, suivant en cela votre jurisprudence, n'attache pas une importance considérable aux cartes et les considère au mieux comme élément de preuve concordante.

Venons-en aux observations de nos contradicteurs.

La Partie libyenne semble nous avoir reproché de n'avoir pas signalé la présence de réserves, notamment sur certaines cartes de l'ONU. Nous avons rappelé la portée de ces mentions ("disclaimers") dans notre contre-mémoire (contre-mémoire du Tchad, par. 10.18). Un "disclaimer", chacun le sait, fait obstacle à tout phénomène d'acquiescement ou d'*estoppel*, mais n'empêche pas une carte de contribuer à la notoriété générale d'une ligne frontière ou à son absence de notoriété.

J'observe que toutes les cartes de l'ONU sont assorties d'un tel "disclaimer", d'une telle réserve, aussi bien les cartes publiées avant 1960 que les cartes publiées après 1960. Quant à la carte géologique libyenne de 1962 qui porte la frontière de 1919, j'ai indiqué expressément la présence de cette réserve, de ce "disclaimer" lors de ma première plaidoirie sur les cartes et ceci n'atténue en rien d'ailleurs les observations que je vais vous présenter à ce propos.

Monsieur le Président, Messieurs de la Cour, je donne volontiers acte à M. Sohier de sa remarque touchant les cartes italiennes de 1926. Ces cartes portent bien la ligne dite "mathématique". Si je ne les ai pas retenues, c'est parce qu'elles avaient un autre objet, celui d'illustrer les programmes d'expansion coloniale italienne si chers à nos contradicteurs et que dans ces cartes "la ligne mathématique" n'est pas indiquée comme une ligne frontière. En tout état de cause la ligne mathématique disparaît donc en 1926 de toute carte publiée par un des Etats concernés à un titre ou à un autre par le différend.

Le croquis distribué à la Cour et projeté par M. Sohier, tiré des archives de l'OUA et portant le n° 88 dans le grand livre vert, mérite une mention spéciale. D'abord, ce n'est pas une carte publiée, je ne l'ai donc pas retenue à ce titre puisque mon critère était celui de la notoriété résultant de la publication. Ensuite et contrairement à ce que dit M. Sohier ce croquis n'a pas été produit en annexe à la réplique libyenne. Une carte semblable s'y trouve, la carte LR 33 (réplique de la Libye, annexes supplémentaires, vol. 2, n° 2, par. 6) que vous trouverez dans votre dossier d'audience.

Vous remarquerez sans peine la différence. Sur la carte LR 33, la légende a été supprimée et les mentions ont été modifiées. En particulier, la ligne indiquée sur la légende du document authentique comme "frontière du Tchad et de la Libye accords 21 mars 1899 8 septembre 1919

et 10 août 1955" cette légende a été rebaptisée "1919 Anglo-French Convention", ce qui n'est pas tout à fait la même chose, vous en conviendrez.

Il me semble ici que les cartographes de la Partie libyenne aient fait preuve d'un peu trop de talent dans la mise en page oserais-je dire la mise en condition du document. La Cour appréciera.

Un dernier mot sur ce croquis. M. Sohier a observé à son propos : "There is not indication or record in this case that Chad expressed any objection to this map." (CR 93/28, p. 26.)

Le Tchad n'avait aucune raison d'objecter à ce document conforme à ses thèses puisqu'il identifie correctement la frontière du Tchad et de la Libye en précisant "accords 21 mars 1899, 8 septembre 1919 et 10 août 1955", ces trois accords définissant une même ligne frontière. Mais, Monsieur Sohier, la Libye n'a pas objecté non plus. S'il y a acquiescement, Monsieur le Président, à propos de ce document, c'est là qu'il faut le chercher.

Pour revenir à l'ensemble du matériel cartographique, Monsieur le Président, Messieurs de la Cour, nous pouvons confirmer nos conclusions de l'autre jeudi, à une nuance près, que je vous rappelle :

1. Pas une seule carte publiée ne porte la ligne réclamée par la Libye dans ses conclusions, c'est-à-dire le 15e parallèle.

2. Pas une seule carte publiée depuis 1926, voilà la correction, ne porte la ligne mathématique.

3. Pas une seule carte publiée depuis l'indépendance des deux Parties ne porte la ligne du traité de 1935, à l'exception bien entendu des cartes libyennes. Tout au plus, cette ligne est-elle indiquée en alternative avec la ligne de 1899-1919, encadrant ainsi la bande d'Aouzou.

4. Nous ne relevons pas une seule protestation libyenne contre les très nombreuses cartes publiées et qui ont été fournies par les Parties, alors que la France, puis le Tchad, ont réservé leurs droits lorsque quelques cartes ont porté le tracé de la frontière de 1935.

Nous maintenons en conséquence nos conclusions : l'ensemble des cartes produites par les Parties constitue un élément de preuve concordante à l'appui des dire de la République du Tchad.

Monsieur le Président, je vous remercie pour cette brève attention, j'espère ne pas avoir trop retenu l'attention de la Cour et je vous prie de passer la parole au professeur Pellet.

The PRESIDENT: Thank you very much, Professor Cot.

Professor Pellet.

M. PELLET : Merci beaucoup, Monsieur le Président.

1. "*Lutetia* était romaine, donc Paris est italienne ! " "*Londinium* était romaine, donc, Londres est italienne !" Monsieur le Président, Messieurs de la Cour, c'est à peu près ce que la Libye voudrait faire croire. Encore faut-il noter que, dans cette équation étrange, la première proposition, au moins, est exacte : *Lutetia* et *Londinium* furent, en effet, romaines.

Mes collègues et amis de l'équipe du Tchad ont montré qu'en revanche il n'est pas exact que le BET, non plus que sa partie septentrionale, la bande d'Aouzou, furent ni ottomanes, ni "senoussistes" si, du moins, l'on veut bien se rappeler que la Senoussia ne fut pas autre chose qu'une confrérie religieuse, certes puissante, organisée et, à certains égards éclairée encore qu'elle a fondé une grande partie de sa prospérité sur l'odieux trafic des esclaves , mais qu'elle ne fut jamais u n Etat au sens que le droit international donne à ce mot depuis les temps modernes. Le professeur Shaw l'a rappelé.

2. Bien sûr que le BET n'était pas, pour autant, *terra nullius*. Mais il n'en résulte nullement, comme le professeur Higgins l'a montré, qu'il était territoire étatique au moment où la France s'est assurée de son contrôle exclusif. Ainsi que l'avait admis le roi Victor-Emmanuel III dans l'affaire de l'*Ile de Clipperton* "la prise de possession matérielle ... est une condition nécessaire de l'occupation" (*RSA*, vol. III, p. 1110). Dans le cas du BET, ce fut chose faite à partir de 1913 et, par la suite, les Français ont occupé effectivement la région immense qui fait aujourd'hui l'objet des convoitises de la Libye et l'ont administrée à titre de souverain; ce faisant, la France a acquis un titre territorial conformément au droit international en vigueur à l'époque. Il était détestable ? Certes ! Mais il était

le droit; ni le Tchad, ni la Libye n'en sont responsables et, comme tant d'autres, ils en ont subi les conséquences. Mais, Monsieur le Président, nous l'avons déjà dit (cf. CR 93/21, p. 24), on ne refait pas l'histoire; on en tire des leçons pour l'avenir.

3. Monsieur le Président, les internationalistes connaissent bien la théorie "du meilleur titre", popularisée par le célèbre arbitrage de Max Huber de 1928 (affaire de l'*Ile de Palmas, RGDIP*, 1935, voir notamment p. 164 et 201). Mais, en l'espèce, cette théorie ne peut pas jouer : pour que l'on puisse parler de "meilleur titre", il faut que deux prétentions juridiques soient en présence, l'une mieux fondée que l'autre; ce n'est pas le cas en l'espèce : à partir de 1913, les Ottomans se sont retirés, pour toujours, et sans avoir pu affermir le titre qu'aurait pu leur conférer leur occupation éphémère et la Senoussia au même moment s'est repliée sur Koufra d'où elle n'exercera plus jamais la moindre influence temporelle sur le BET. Si la Libye entend se placer sur le terrain des effectivités, elle se trompe de titulaire; le professeur Cassese vient de le montrer : ni les Turcs, ni les Senoussistes, ni plus tard, les Italiens n'ont exercé la moindre prérogative étatique dans la région revendiquée par la Libye; et nos contradicteurs peuvent toujours ironiser sur tel ou tel aspect de la présence française, celle-ci en tout cas, existait bel et bien; surtout si l'on se rappelle que, conformément à une jurisprudence constante, on ne peut exiger que les manifestations de souveraineté soient identiques au Groenland ou dans toute autre zone inhospitalière et dans certaines parcelles frontalières aux confins de la Belgique et des Pays-Bas.

Ce n'est pas de "meilleures effectivités" ou de "meilleur titre" qu'il faut parler : en l'espèce, il s'agit d'effectivités françaises contre des "ineffectivités" totales de la part de tous les autres prétendants et cela suffirait à fonder le titre de la France dont le Tchad a hérité.

4. Monsieur le Président, je l'ai dit tout à l'heure en introduisant nos plaidoiries de cette semaine : nous ne sommes revenus sur tout cela que pour "déblayer le terrain", "to clear the decks". Il y a plus simple, plus évident : toujours le traité franco-libyen du 10 août 1955 qui reconnaît clairement l'étendue des souverainetés territoriales respectives de chacune des Parties en définissant leur frontière commune par référence à un certain nombre d'actes internationaux antérieurs.

La Partie libyenne fait des efforts désespérés pour jeter l'anathème juridique sur ces instruments de référence :

1) ils ne seraient plus en vigueur à la date de la conclusion du traité; le professeur Cot y reviendra mercredi;

2) la ligne en résultant serait indécise; de cela je reparlerai demain ou tout à l'heure; et

3) cette ligne ne constituerait pas une frontière.

5. Si l'on se place à la date à laquelle ces traités ont été conclus, nos contradicteurs ont certainement raison au moins en ce qui concerne le secteur oriental de la frontière, car, à l'ouest, le fameux segment allant de Toummo au tropique du Cancer était, de longue date, défini comme constituant une frontière, ainsi qu'en témoignent les cartes de l'époque et comme la France et l'Italie l'ont reconnu formellement en 1902.

Il reste qu'à l'est, la déclaration franco-britannique de 1899 définissait non pas une frontière, mais la limite de la zone d'influence française. Nous en sommes d'accord. Mais le temps ne s'est pas arrêté au 21 mars 1899. Cette ligne, qui n'était pas une frontière à l'origine, l'est devenue : elle s'est consolidée en même temps que s'affermissait le titre colonial français et que, par l'occupation effective de la sphère d'influence que lui avaient reconnue la Grande-Bretagne et l'Italie, la France l'avait transformée en une véritable possession coloniale.

6. M. Maghur conteste ceci au prétexte que "Article 3 of the 1955 Treaty operates to exclude colonial *effectivités* in the determination of any boundary pursuant to its terms" (CR 93/27, p. 51). Voilà qui est singulier.

Le professeur Jean-Pierre Cot avait déjà montré pourquoi l'interprétation du traité de 195 n'excluait pas la prise en considération des effectivités en soulignant les confusions de la thèse libyenne à ce propos (CR 93/21, p. 74-76). J'y ajouterai seulement une considération plus générale.

Les traités, Monsieur le Président, ne sont pas des parchemins desséchés : ils vivent, ils évoluent ; et la preuve en est donnée par la règle générale d'interprétation codifiée par l'article 31 de la convention de Vienne de 1969, qui impose de tenir compte, "en même temps que du contexte : ... *b)* De toute pratique *ultérieurement* suivie dans l'application du traité" et, surtout, "*c)*

De toute règle pertinente de droit international applicable dans les relations entre les parties". Dans un autre contexte, la Cour ne disait pas autre chose lorsque, dans son avis consultatif de 1971 relatif à la *Namibie*, elle rappelait que les principes du Pacte de la SdN eux-mêmes devaient être interprétés en fonction de "l'évolution que le droit a ultérieurement connue" et "dans le cadre de l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu" (*C.I.J. Recueil 1971*, p. 31) ou lorsque la Cour disait également, à propos du concept de "statut territorial" tel qu'il était visé dans l'instrument d'adhésion de la Grèce de 1931 à l'acte général d'arbitrage, en 1978 : "il faut nécessairement présumer que son sens était censé évoluer avec le droit et revêtir à tout moment la signification que pourraient lui donner les règles en vigueur" (*Plateau continental de la mer Egée, C.I.J. Recueil 1978*, p. 32).

Ces considérations s'imposent d'autant plus fortement s'agissant de la déclaration de 1899 qu'elle définissait une sphère d'influence et le professeur Crawford a, très justement, convenu que des accords de ce type ne sont que des "pas", des "préludes" vers la souveraineté territoriale (CR 93/19, p. 50). Face à une situation évolutive par essence, une interprétation évolutive s'impose en fonction de l'évolution envisagée par l'accord de sphère d'influence : si celle-ci se consolide en possession coloniale, la limite, que fixait l'accord, devient frontière et il serait tout à fait incongru de n'en point tenir compte.

7. Du reste, l'article 3 du traité du 10 août 1955 apporte lui-même la réponse à l'objection soulevée par M. Maghur : il renvoie à la date critique de 1951 en parlant "des actes internationaux en vigueur à la date de la constitution du Royaume de Libye". C'est donc à cette date qu'il faut se placer pour interpréter ces instruments or, à cette date, la limite de la zone d'influence française fixée par la déclaration de 1899 était sans aucun doute devenue depuis longtemps une frontière internationale.

Au surplus, il est assez paradoxal de voir la Libye tenter d'empêcher le Tchad d'interpréter les actes de référence mentionnés par l'annexe I au traité de 1955 à la lumière des effectivités, alors que c'est elle-même, qui affirme pourtant vouloir appliquer ce traité, qui recourt à tous les articles et, notamment, au traité de 1935, qui n'y est pas cité, qui n'a jamais été ratifié, pour, j'ose à peine dire

"interpréter" le traité franco-libyen de 1955, mais, plutôt, pour le vider de toute substance.

8. J'ai abordé ces problèmes en "introduction" à la deuxième partie de nos plaidoiries car ils concernent à la fois les deux sections de cette partie, que le professeur Cassese et moi vous présenterons.

Ceci étant dit, Monsieur le Président, tout cela n'a qu'une importance secondaire : l'annexe I au traité de 1955 énumère six actes internationaux en vigueur et, par l'article 3, "les deux Hautes Parties contractantes reconnaissent que les frontières séparant" l'AEF (c'est-à-dire le Tchad) et la Libye en résultent. Il est, pour le moins, hasardeux de prétendre, comme le font nos contradicteurs, que la ligne résultant de ces accords ne constituent pas une frontière : le texte du traité, que je me suis borné à citer, dit très exactement le contraire !

9. Parmi les textes auxquels se réfèrent l'article 3 et l'annexe I du traité du 10 août 1955, trois sont nécessaires et suffisants pour déterminer le tracé de la frontière :

la d éclaration franco-britannique du 21 mars 1899,

la convention suppl émentaire, franco-britannique également, du 8 septembre 1919, et

l' échange de lettres franco-italien du 1er novembre 1902.

M. Sohier, mercredi dernier, s'est étonné de cette énumération : si la convention de 1919 indique la même ligne que celle de 1899, ou si, en vertu du principe *lex posterior*, la seconde, celle de 1919, doit, de toutes façons, l'emporter sur la première, celle de 1899, "why in the world did Article 3 and Annexe I not simply say so by providing that the parties accepted the 1919 line as Libya's southern boundary" (CR 93/28, p. 16-17). Je suis surpris que la réponse ait échappé à mon contradicteur ; elle est pourtant très simple : le point d'aboutissement de la ligne fixée en 1899 et confirmée en 1919 est, en effet, identique à ces deux dates ; il s'agit de l'intersection entre le 24e degré de longitude est de Greenwich et le parallèle 19° 30' de latitude. Mais l'interprétation donnée par la convention supplémentaire de 1919 concerne exclusivement cette extrémité orientale de la frontière ; en revanche, la convention de 1919 est muette sur le point de départ de la ligne : d'où la nécessité de mentionner aussi la déclaration de 1899 faute de quoi la description de la frontière tchado-libyenne n'eût pas été complète.

Je remarque en passant que ceci confirme que les négociateurs du traité de 1955 ont pris grand soin de définir une frontière continue dont aucun secteur ne devait demeurer indéterminé.

En revanche, il va de soi que le traité Laval-Mussolini de 1935 ne pouvait pas figurer parmi les actes auxquels renvoie l'accord de 1955, pour la simple raison que le traité de 1935 n'est jamais entré en vigueur et qu'une référence à ce texte mort-né eût été à l'origine, pour le coup, d'une grave confusion. La France et la Libye l'ont d'ailleurs exclu en toute connaissance de cause de l'énumération. La ligne que trace le traité de 1935 est évidemment différente de celle résultant des accords antérieurs puisqu'il s'agissait bien d'une cession de territoire comme le rappellera demain le professeur Cassese.

10. Ce sont donc bien trois actes de référence qu'il faut étudier, et non point deux comme l'a suggéré M. Sohier. Je m'y attacherai dans un premier temps, si vous le voulez bien, Monsieur le Président, tandis que M. Cassese, qui me succédera, analysera les effectivités coloniales de la France jusqu'en 1955 et montrera qu'elles confirment les titres conventionnels dont la France entend se prévaloir.

Well now, Mr. President, I am ready to go on but my pleading will be of quite a different character and it has not been circulated to the Registry, so maybe it would be better to stop here.

The PRESIDENT : If you wish, Professor Pellet, we can go on for another 10 minutes if you would prefer that, but perhaps as you are giving us some more papers tomorrow, perhaps we should wait. So 10 o'clock tomorrow morning. Thank you.

The Court rose at 12.50 p.m

CR 93/31

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNEE 1993

Audience publique

tenue le mardi 13 juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire du Différend territorial (Jamahiriya arabe libyenne)

COMPTE RENDU

YEAR 1993

Public sitting

held on Tuesday 13 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

Présents : sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh, juges

MM. Sette-Camara
Abi-Saab, juges *ad hoc*

M. Valencia-Ospina, Greffier

Le Gouvernement de la Jamahiriya arabe libyenne est représenté par :

S. Exc. M. Abdulatin Ibrahim El-Obeidi
ambassadeur,

comme agent;

M. Kamel H. El Maghur
membre du barreau de Libye,

M. Derek W. Bowett, C.B.E., Q.C., F.B.A.
professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge,

M. Philippe Cahier
professeur de droit international à l'Institut universitaire de hautes études internationales de l'Université de Genève,

M. Luigi Condorelli
professeur de droit international à l'Université de Genève,

M. James R. Crawford
titulaire de la chaire Whewell de droit international à l'Université de Cambridge,

M. Rudolf Dolzer
professeur de droit international à l'Université de Manheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

M. Walter D. Sohier
membre des barreaux de l'état de New York et du district de Columbia,

comme conseils et avocats;

M. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

M. Rodman R. Bundy
avocat à la Cour, Frere Cholmeley, Paris,

M. Richard Meese
avocat à la Cour, Frere Cholmeley, Paris,

Mlle Loretta Malintroppi
avocat à la Cour, Frere Cholmeley, Paris,

Mlle Azza Maghur
membre du barreau de Libye,

comme conseils;

M. Scott b. Edmonds
cartographe, Maryland Cartographics Inc.,

M. Benett A. Moe
cartographe, Maryland Cartographics Inc.,

M. Robert C. Rizzutti
cartographe, Maryland Cartographics Inc.,

comme experts.

Le Gouvernement de la République du Tchad est représenté par :

M. Abderahman Dadi, directeur de l'école nationale d'administration et de magistrature de N'Djamena,

comme agent;

S. Exc. M. Mahamat Ali-Adoum, ministre des affaires étrangères de la République du Tchad,

comme coagent;

S. Exc. M. Ahmad Allam-Mi, ambassadeur de la République du Tchad en France,

S. Exc. M. Ramadane Barma, ambassadeur de la République du Tchad en Belgique et aux Pays-Bas,

comme conseillers;

M. Alain Pellet, professeur à l'Université de Paris X - Nanterre et à l'Institut d'études politiques de Paris,

comme agent adjoint, conseil et avocat;

M. Antonio Cassese, professeur de droit international à l'Institut universitaire européen de Florence,

M. Jean-Pierre Cot, professeur à l'Université de Paris I (Panthéon-Sorbonne),

M. Thomas M. Franck, titulaire de la chaire Becker de droit international et directeur du centre d'études internationales de l'Université de New York,

Mme Rosalyn Higgins, Q.C., professeur de droit international à l'Université de Londres,

comme conseils et avocats,

M. Malcolm N. Shaw, titulaire de la chaire Ironsides Ray and Vials de droit à l'Université de Leicester, membre du barreau d'Angleterre,

M. Jean-Marc Sorel, professeur à l'Université de Rennes,

comme avocats;

M. Jean Gateaud, ingénieur général géographe honoraire,

comme conseil et cartographe;

Me Jean-Pierre Mignard, avocat à la Cour d'appel de Paris,

Me Marc Sassen, avocat et conseiller juridique, La Haye,

comme conseils;

Mme Margo Baender, assistante de recherche au centre d'études internationales de la Faculté de droit de l'Université de New York,

M. Olivier Corten, assistant à la faculté de droit de l'Université libre de Bruxelles,

M. Renaud Dehousse, maître-assistant à l'Institut universitaire européen de Florence,

M. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche à l'Université de Paris X - Nanterre,

M. Joseph Tjop, attaché temporaire d'enseignement et de recherche à l'Université de Paris X - Nanterre,

comme conseillers et assistants de recherche;

Mme Rochelle Fenchel,
Mme Susan Hunt,
Mlle Florence Jovis,
Mme Mireille Jung,
Mme Martin Soulier-Moroni.

The PRESIDENT : Please be seated. Professor Pellet.

M. PELLET : Merci Monsieur le Président. Monsieur le Président, Messieurs les juges, hier matin, j'ai introduit la deuxième partie de nos plaidoiries.

Si vous le voulez bien, je change maintenant de fonctions. J'enlève ma casquette de guide pour me présenter tête nue devant vous, puisque nous n'avons pas le bonheur de pouvoir coiffer les "wigs"dont nos amis britanniques peuvent se parer, et j'aborde la substance même de cette deuxième partie qui consiste surtout à analyser les trois actes internationaux pertinents auxquels renvoie le traité de 1955.

1. Comme je l'ai rappelé hier, Monsieur le Président, l'objectif de l'article 3 et de l'annexe I est de définir une ligne frontalière continue partant du golfe de Gabès et aboutissant au tripoint avec le Soudan — d'où la nécessité pour les Parties de se référer à la fois à la déclaration franco-britannique du 21 mars 1899 *et* à la convention supplémentaire du 8 septembre 1919. Ceci est la seule manière de couvrir le secteur oriental de la frontière, tandis que l'échange de lettres franco-italien daté du 1er novembre 1902 couvre, en ce qui le concerne, le secteur occidental du tropique du cancer au tripoint avec le Niger, ce tripoint étant situé à l'intersection du 15e méridien et de la ligne allant du tropique à Toummo.

Monsieur le Président, il est clair qu'en 1955, la France et la Libye ont entendu déterminer une ligne frontalière unique. Toutefois, pour la seule commodité de l'exposé, j'examinerai successivement les problèmes juridiques — si problèmes il y a : la Libye en invente beaucoup — concernant, d'une part, le secteur occidental de la frontière et, d'autre part, le secteur oriental.

I. Le secteur occidental de la frontière

2. Commençons, Monsieur le Président, si vous le voulez bien, par le secteur occidental. Pour simplifier le raisonnement, je parlerai comme d'un tout de la ligne qui va de Toummo au tropique du Cancer, mais en gardant à l'esprit le fait que la frontière commune du Tchad et de la Libye ne va pas jusqu'à Toummo; au-delà du tripoint dont, du reste, la Libye n'a jamais dit un mot et dont l'emplacement résulte de l'arrêté français du 18 février 1930, cette ligne sépare la Libye du Niger.

3. Le tracé de la frontière dans ce secteur peut être déterminé de deux manières :

En premier lieu, les deux points extrêmes de ce segment de frontière sont fermement établis. Le point de départ, à l'ouest, l'est par l'arrangement franco-italien du 12 septembre 1919, auquel renvoie expressément l'annexe 1 au traité de 1955. Quant au point d'arrivée, il est déterminé par l'article 3 de la déclaration de 1899 qui fait partir la limite de la zone française "du point de rencontre du tropique du Cancer avec le 16e degré de longitude est de Greenwich".

Ces points étant déterminés avec une précision suffisante par des actes dont la valeur juridique est indiscutable, ont doit en déduire que la frontière est constituée par une ligne qui les relie. C'est du reste bien ainsi qu'a procédé la Chambre de votre Cour dans l'affaire du *Différend frontalier* lorsque, étant parvenue à la conclusion que la frontière passait par tels ou tels points,elle les a reliés entre eux (voir par exemple *C.I.J. Recueil 1986*, p. 641). De la même manière, dans son arrêt du 11 septembre 1992, la Chambre constituée pour trancher l'autre différend frontalier entre El Salvador et le Honduras a considéré qu'à défaut de critère contraire, la ligne frontière reliant entre eux deux points juridiquement établis "doit être une ligne droit" (*C.I.J. Recueil 1992*, p. 437).

4. Mais en l'occurrence, et en second lieu, le tracé de la frontière entre Toummo et le tropique du Cancer peut également être déduit de l'accord franco-italien de 1902.

Le professeur Condorelli, auquel une longue fréquentation de la sage Helvétie n'a rien enlevé de sa fougue méridionale, fait mine s'émerveiller du "coup de théâtre" que le Tchad aurait ménagé "le 29 juin 1993 à la 11e heure" (CR 93/28, p. 29), ce que, plus sobrement, M. Sohier avait également souligné la veille (CR 93/27, p. 60).

Mon collègue et ami Condorelli est un spectateur bien indulgent d'applaudir à ce qu'il croit être un retournement de situation. Il a probablement tout oublié des "épisodes précédents" ...

En tout cas, Monsieur le Président, le Tchad n'a pas modifié sa position d'un iota "le 29 juin à la 11e heure".

Analysant l'échange de lettres du 1er novembre 1902, il écrivait, dans son mémoire que l'expression "limite de l'expansion française en Afrique septentrionale" vise "la frontière de la Tripolitaine" figurant sur la carte du *Livre jaune* (p. 175, par. 118) et le Tchad ajoutait "l'Italie y

reconnaît formellement la frontière — et non plus une simple limite zone d'influence — de la Tripolitaine existant à l'époque" (p. 182, par. 148). Cette position est largement développée dans le contre-mémoire tchadien (voir par exemple par. 8.158, p. 354) et dans la réplique (par. 2.46, p. 52; voir aussi par. 2.47).

Le Tchad n'a pas modifié sa position et M. Sohier l'a bien vu, finalement, puisque, le 6 juillet, il a reconnu ingénument que, lors de la présentation des accords de 1900-1902 par le Tchad durant le premier tour des plaidoiries orales, "one heard largely a repetition of Chad's written pleadings" (CR 93/27, p. 72).

5. Du reste, ce n'est pas ce qui importe. La question est bien plutôt de savoir si l'argumentation que j'ai développée était ou n'était pas fondée. Attachés qu'ils sont à présenter une critique de la "mise en scène", nos contradicteurs sont étonnamment discrets sur le texte de la pièce.

Le seul élément qui semble avoir retenu leur attention est le suivant : selon eux, la maintenant fameuse "ligne sinueuse" n'était pas la "vraie" frontière de la Tripolitaine et n'a pas été reconnue comme telle par la france et l'Italie en 1902. M. Maghur nous l'a dit (CR 93/27, p. 23); M. Sohier nous l'a redit — fort longuement — le 6 juillet (CR 93/27, p. 64 et suiv.) et, à nouveau, le 7, à trois reprises différentes (CR 93/28, p. 12, 13 et 210; et le professeur Condorelli — qui avait pourtant indiqué qu'il traiterait de la période ultérieure — y est revenu, lui, ... je ne compte plus, Monsieur le Président : un très grand nombre de fois en tout cas (CR 93/28, p. 30, 31, 34-35, 36-38, etc.).

Quoiqu'en pense le professeur Crawford, la répétition d'une pétition de principe ne constitue tout de même pas une preuve suffisante de son exactitude !

6. Que disent, sur le fond, les conseils de la Libye ? Simplement ceci : que la légende de la carte du *Livre jaune*, à laquelle se réfèrent Prinetti et Barrère, n'identifie pas expressément "la ligne sinueuse en pointillés qui encercle la Tripolitaine" comme une frontière (voir par exemple CR 93/27, p. 67); d'autres fois, ils précisent que ce n'est pas une frontière "conventionnelle" (cf. CR 93/27, p. 23 — M. Maghuir — ou p. 68 *in fine* — M. Sohier).

Ceci m'oblige d'ailleurs, Monsieur le Président, à une digression. Elle sera brève, mais nous y attachons une certaine importance : si *certaines* frontières sont conventionnelles, ceci ne veut pas

dire que *toutes* les frontières sont ou doivent être conventionnelles. Ce n'est pas parce qu'Epaminondas est à la fois crétois et menteur que tous les Crétois sont des menteurs !

Et il existe, de par le monde, quantité de limites interétatiques qui ne sont pas conventionnelles, mais qui n'en sont pas moins de bonnes et véritables frontières; tel est du reste le cas de la plupart des frontières entre les Etats issus du démembrement d'un même empire colonial et la principale fonction du principe *uti possidetis* est d'en garantir la pérennité.

7. Dans notre cas, il est certain que la frontière de la Tripolitaine n'était pas, en 1902, "conventionnelle", mais elle n'en était pas pour autant "notional" ou "uncertain" ou "undefined" comme l'a dit M. Sohier (CR 93/27, p. 67; voir aussi p. 66).

Premièrement, la Libye elle-même a admis ceci en procédure : cette ligne, a-t-elle écrit, "was commonly regarded at the time to be the Tripolitanian border" (contre-mémoire de la Libye, p. 237, par. 4.254); bon, je veux bien admettre que ce n'est pas une raison décisive ! Mais

deuxièmement, c'est en effet ainsi que la plupart des cartes de l'époque figurent la frontière de la Tripolitaine; et

troisièmement, le texte de l'accord franco-italien ne peut, en tout état de cause, pas être passé à "pertes et profits" comme le voudrait la Partie libyenne.

Revenons, si vous le voulez bien, Monsieur le Président, sur ces deux derniers points.

8. Les cartes d'abord.

Je n'y insisterai pas beaucoup, Messieurs de la Cour, puisque le dossier de plaidoirie qui vous a été distribué ce matin, ainsi qu'à la Partie libyenne, contient une liste de cartes établies durant la période allant de 1892 à 1919 et figurant la frontière de la Tripolitaine, ou en tout cas, sa partie occidentale, selon un tracé identique à celui de la carte du *Livre jaune*. Ces cartes sont au nombre de vingt et une ce qui n'est pas négligeable. Certaines d'entre elles comportent une légende qui indique qu'il s'agit là de la frontière de la Tripolitaine. D'autres ne disent rien. C'est le cas de celle du *Livre jaune*. J'y reviendrai.

En revanche, la carte de Justus Perthes porte une telle légende et, quoi qu'en ait dit M. Sohier le 6 juillet (CR 93/27, p. 65), cette légende, qui correspond bien à la représentation cartographique,

pour autant qu'on ne la retouche pas, indique clairement d'abord

— que la ligne en pointillés correspond à une "frontière coloniale" *(kolonialgrenzen)* et ensuite

— que le surlignage plus épais de couleur orange claire, indique qu'il s'agit de la frontière de "possessions ou protectorats turcs" *(Turkische Besitzungen und Schutzländer)*.

Il est exact que, autour de Toummo, cette ligne figure la frontière en traits discontinus, alors que, dès l'abord du tropique du Cancer, elle est, de nouveau, en pointillés continus. Sur les cartes modernes, un tel procédé a la même signification qu'un *disclaimer*; peut-être est-ce que Justus Perthes avait à l'esprit lorsqu'il a dessiné sa carte; je ne suis pas sûr que l'on puisse en tirer de grandes conclusions au plan juridique. En tout cas il est certain que cette figuration cartographique ne permet pas de voir dans cette ligne autre chose que la frontière coloniale d'une possession turque, comme ceci est indiqué sur la légende.

Je ne reviens pas sur la "retouche" que la partie libyenne a cru pouvoir apporter à ce tracé sans la signaler : M. Maghur a semblé contester la matérialité de cette "bavure" (CR 93/27, p. 21) mais M. Sohier l'a reconnue (CR 93/27, p. 64). Dont acte. Je regrette cependant qu'au lieu de s'en excuser, ce qui aurait été probablement le plus simple, mon contradicteur ait cru devoir, je dirais, "contre-attaquer" en accusant le Tchad d'avoir produit, lui aussi, des documents "that misrepresent or obscure a correct reading of the *Livre jaune* map" (CR 93/27, p. 68), ceci en reproduisant des cartes en noir et blanc publiées dans le *Bulletin du Comité de l'Afrique française* ou dans *Le Figaro*.

Mais ce n'est pas du tout la même chose, Monsieur le Président ! Ces cartes existent; elles n'ont pas été retouchées; au surplus, et ceci devrait rassurer nos contradicteurs, elles ne comportent pas de légende en ce qui concerne la limite de la Tripolitaine; pas davantage que le *Livre jaune*.

Il est superflu de poursuivre cette escarmouche. Et il est assurément plus intéressant de constater d'une part, que la frontière de la Tripolitaine tracée sur la carte du *Livre jaune* figure aussi sur de nombreuses cartes de l'époque et, d'autre part, que lorsque ce tracé correspond à un élément repris dans la légende, il est indiqué comme figurant une frontière coloniale.

9. Pas une "frontière conventionnelle", certes ! Mais une frontière; et, comme je l'ai dit il y a quelques instants, il est tout à fait abusif d'assimiler "frontière" et "frontière conventionnelle".

"Conventionnel", notre segment de frontière — de Toummo au tropique du Cancer — ne le deviendra, justement, qu'en 1902, lorsque, par l'échange de lettres Prinetti-Barrère, l'Italie et la France reconnaîtront que la ligne figurant sur la carte de 1899 est la frontière de la Tripolitaine.

Encore le caractère conventionnel de la frontière n'est-il alors qu'indirect et la Partie libyenne n'a pas tort de remarquer qu'à l'époque l'Italie et la france n'exerçaient pas de souveraineté territoriale dans la région et ne pouvaient donc pas établir une frontière (voir CR 93/27, p. 62). Ceci, au demeurant, ne les empêchait nullement de reconnaître les frontières d'un Etat tiers. Ce n'est pas quelque chose d'extraordinaire; il n'est pas rare qu'un ou plusieurs Etats tiers reconnaissent la frontière d'un Etat avec lequel ils n'ont aucune frontière commune : le professeur Verhoeven en donne plusieurs exemples dans son ouvrage sur *La reconnaissance internationale dans la pratique contemporaine*, qu'il s'agisse de la ligne Oder-Neisse ou des frontières du Cambodge et j'indique aussi, par manière de parenthèses, qu'il évoque également le cas de la reconnaissance de zones d'influence préexistantes par des Etats tiers (Pédone, Paris, 1975, p. 320-335).

10. Bien entendu, l'Empire ottoman n'était pas lié par l'échange de lettres du 1er novembre 1902; mais la France l'était à l'égard de l'Italie comme l'Italie l'était à l'égard de la france. Et j'avoue ne pas très bien comprendre ce que veut dire M. Sohier lorsqu'il affirme que cette reconnaissance des limites du territoire ottoman par l'Italie "would involve a purely *personal* undertaking towards France" (CR 93/27, p. 75). "Personal" ou pas, il y avait là un engagement juridique et il n'y a strictement aucune raison pour que la "personne" — l'Italie — qui avait pris cet engagement, en soit déliée au prétexte que, en 1912, elle prend effectivement possession de la sphère d'expansion que lui avait reconnue la France.

C'est le contraire qui est exact : avant 1912, la France est encore assez loin dans le sud et l'Italie n'est pas là du tout. Après 1912, au contraire, la France commence à s'installer effectivement dans le nord du Tchad et l'Italie prend pied en Libye avec la bénédiction de la France qui reconnaît la légitimité de sa présence. Tel était l'un des éléments du compromis de 1902. Mais il y a avait un *quid pro quo* : outre le protectorat français au Maroc, qu'elle avait accepté par avance, l'Italie avait reconnu la frontière de la Tripolitaine. Sans doute, vis-à-vis d'Etats tiers par rapport aux accords de

1900-1902, l'Italie pouvait-elle se sentir libre de remettre en cause la frontière de la Tripolitaine-Cyrénaïque figurant sur la carte de 1899 et, en effet, elle la remettra en cause dans ses relations avec la Grande-Bretagne. J'en redirai un mot. Mais, dans ses rapports avec la france, l'Italie était liée par cette acceptation réciproque.

Telle est la situation donc dans laquelle se trouvait l'Italie à l'égard de la France. Et c'est d'ailleurs probablement parce qu'elle en avait conscience qu'elle n'a jamais, en fait, remis en cause cette portion de la frontière où aucun incident n'a été signalé par la Partie libyenne, pourtant fort habile à les dénicher. Davantage même : l'Italie reconnaît qu'elle est liée. Ceci est manifeste si l'on se reporte, par exemple, aux cartes n[os] 54 et 56 du mémoire libyen qui illustrent les programmes coloniaux italiens maximal et minimal et figurent "la ligne sinueuse" avec la légende suivante (que je traduis en français) : "Accords secrets France-Italie 14 et 16 décembre 1900 et 1[er] novembre 1902".

Peut-être l'Italie n'avait-elle pas remarqué le "talon d'Achille" de la position juridique de la France ? En tout cas, elle a préféré s'en prendre au secteur oriental de la frontière, le "talon" que la Partie libyenne semble pourtant tenir pour invulnérable...

11. Avant d'en venir à celui-ci, permettez-moi, Monsieur le Président, de récapituler brièvement ce que l'on peut dire en ce qui concerne la partie occidentale de la frontière :

1) Toummo et l'intersection du tropique du Cancer et du 16[e] méridien sont deux points fermement établis par l'arrangement franco-italien du 12 septembre 1919 d'une part, et la déclaration franco-britannique de 1899, d'autre part, deux accords auxquels fait expressément référence l'annexe I au traité du 10 août 1955;

2) quand bien même ces deux points seuls auraient été fixés, il serait légitime de considérer qu'ils sont reliés par une ligne droite qui constitue la frontière entre le Tchad et la Libye depuis le 15e degré est de Greenwich. Mais,

3) ce tracé est confirmé par celui de la frontière de la Tripolitaine figurant sur la carte du *Livre jaune*, dont les deux Parties sont d'accord pour considérer qu'il s'agit de la carte à laquelle renvoie l'échange de lettres franco-italien daté du 1[er] novembre 1902;

4) par cet accord, la France et l'Italie ont accepté ce tracé qui correspond d'ailleurs à la frontière

habituellement reconnue alors de la Tripolitaine; et

5) l'Italie est liée par cette reconnaissance à l'égard de la France, sans que,

6) elle puisse, après s'être emparée de la Tripolitaine, opposer à la France les revendications de l'Empire ottoman sur un prétendu *hinterland* — d'autant moins que, lorsque l'accord de 1902 a été conclu, l'Italie connaissait parfaitement les prétentions ottomanes, exprimées depuis 1890, et elle s'était associée à la France et à la Grande-Bretagne pour les rejeter; je ne reviens pas sur ce point, qui est suffisamment exposé dans les écritures du tchad (voir notamment : mémoire du Tchad, p. 180-181; contre-mémoire, par. 5.37-5.43, p. 181-184; réplique, par. 2.19 à 2.26, p. 36-43).

II. Le secteur oriental de la frontière

12. J'en viens maintenant, Monsieur le Président, au secteur oriental de la frontière, celui qui part de l'intersection du tropique du Cancer et du 16° méridien et qui aboutit au point de rencontre du 24° méridien et du parallèle 19° 30' nord.

Sa description textuelle, je l'ai rappelé hier, résulte de la combinaison de deux des instruments internationaux définis dans l'annexe I au traité du 10 août 1955 : la déclaration franco-britannique du 21 mars 1899 d'une part, et la convention supplémentaire du 8 septembre 1919, d'autre part.

La première, la déclaration de 1899, fixe le point de départ de la ligne et son orientation générale. La seconde, la convention supplémentaire de 1919, qui constitue l'interprétation authentique de la déclaration, précise, en une formule cette fois dépourvue de toute ambiguïté, le point d'arrivée de la frontière.

Bien entendu, cette ligne est opposable à la Partie libyenne puisqu'elle est fixée par deux actes internationaux définis comme étant en vigueur par un traité en bonne et due forme, dont les Parties s'accordent à reconnaître la validité et qui a été ratifié par la Libye indépendante elle-même : toujours notre traité du 10 août 1955, qui, au surplus, indique, de la manière la plus claire, que cette ligne constitue la frontière entre les deux Etats. Il faut le redire : peu d'Etats africains ont eu la possibilité de définir eux-mêmes, formellement, leur frontière par un accord conclu directement avec la

puissance coloniale voisine; la Libye a eu cette chance.

Trente-huit ans plus tard, ce pays entend pourtant revenir sur l'accord qu'il avait donné et, sans attaquer de front le traité de 1955, nos contradicteurs essaient d'en faire un texte parfaitement "transparent", sans aucune portée.

En ce qui concerne le secteur de la frontière qui nous occupe, ils nous disent en substance que les actes de référence définis à l'annexe I ne peuvent produire d'autres effets juridiques que ceux qui leur seraient de toutes manières attachés si le traité franco-libyen du 10 août 1955 n'avait pas été conclu. "Un traité pour rien" en quelque sorte. Ce raisonnement n'est évidemment pas acceptable. Poursuivons-le cependant.

Et suivant nos contradicteurs lorsqu'ils affirment que les accords de 1899 et de 1919 d'une part, n'ont jamais lié l'Italie, à laquelle la Libye a succédé, et, d'autre part, que ces accords prévoient des lignes incompatibles entre elles.

a) Une ligne unique

13. Monsieur le Président, examinons d'abord cette seconde objection à la lumière de ce qu'ont soutenu les conseils de la Libye la semaine dernière. Ceci nous retiendra relativement peu : la problématique est, maintenant clairement établie et rien de très nouveau n'a été dit par M. Sohier mercredi dernier.

Vous connaissez les positions de la Libye, Messieurs de la Cour; vous connaissez également les nôtres et je m'en voudrais, à ce stade tardif des plaidoiries, de vous infliger de longues redites. Un mot cependant sur deux épisodes situés, l'un juste avant, l'autre juste après la signature de la déclaration et auxquels les deux Parties attachent de l'importance. Je veux parler

— de "l'incident de négociation" du 19 mars 1899 et

— de la note de lord Sanderson à lord Salisbury du 27 mars.

14. Nous savons ce qui s'est produit le 19 mars : ce jour-là, Cambon, l'ambassadeur de France à Londres, réagit à une proposition britannique qui aurait fixé le point d'aboutissement de la ligne de direction sud-est au 18e parallèle (c'était alors un point de départ puisque la ligne était décrite d'est en

ouest). L'ambassadeur français s'y oppose en faisant valoir — je cite une de ses dépêches — "qu'il [est] impossible de pousser la délimitation jusqu'au 18° parallèle, ce qui serait nous enlever [à la France] une partie notable des territoires que nous revendiquons au nord du Darfour" (mémoire du Tchad, annexe 54). C'est à la suite de cette protestation que fut arrêtée la rédaction finale.

Mon contradicteur, qui s'appuie sur une surcharge ajoutée sur un projet manuscrit du 19 mars, sur lequel le 15° parallèle a été substitué au 18e degré nord (mémoire de la Libye, "British Archives Annex", p. 35), en conclut que la ligne devait bien être strictement sud-est (CR 93/28, p. 23-24). L'élément décisif qui contredit cette interprétation est, évidemment, la relation que donne Cambon de l'épisode et qui permet de comprendre les motifs de son opposition à la proposition britannique : il proteste parce qu'elle *enlèverait* à la france une partie notable des territoires qu'elle revendiquait *au nord* du Darfour. Et ce n'est évidemment pas par l'abaissement de la ligne *vers le sud* qu'il pouvait obtenir satisfaction ! C'est pourtant ce qu'affirme M. Sohier. On peut tenir pour acquis que la ligne ne pouvait qu'être remontée *vers le nord*.

Comment, alors, expliquer le passage du 18° au 15° parallèle ? Assez simplement, je crois : et en évitant de mêler deux problèmes différents; car il y en a deux, bien distincts :

— d'une part, celui de la ligne partant du tropique du Cancer; c'est à ce problème que s'applique le raisonnement que je viens de rappeler; à cet égard, la France a intérêt à obtenir le *relèvement* de la ligne; et la France l'obtient;

— d'autre part, et c'est un second problème, la France entend limiter l'ampleur de la zone indéterminée dans laquelle la limite entre les sphères d'influence des deux parties doit encore être fixée et qui fait l'objet de l'article 2 de la déclaration. A cet égard, la France a tout intérêt à obtenir *l'abaissement* de la limite de la zone à délimiter. Et elle l'obtient également — non pas que les Britanniques fussent des négociateurs particulièrement crédules; mais, comme le sait (voir surtout contre-mémoire du tchad, par. 8.20, p. 306, et 8.62 à 8.75, p. 323-328), ils n'éprouvent qu'un intérêt très limité pour la région qui fait l'objet des convoitises de la France.

Pour avoir fait se "téléscoper" les deux problèmes, M. Sohier les rend complètement insolubles; en les distinguant on comprend à la fois le tracé finalement retenu et les motifs de la

satisfaction de Cambon : la zone à délimiter est cantonnée au sud du 15e parallèle; la limite de la zone française suit, certes, une direction sud-est mais aboutit nécessairement au nord du 18e parallèle au lieu d'avoir une ligne droite comme l'envisageait le projet britannique (et comme continue de la rêver la Libye), on aune ligne en deux tronçons qui, assurément, accroît la zone française par rapport à ce qu'avait proposé lord Salisbury.

15. Telle est la ligne, brisée approximativement à la hauteur du 19e parallèle, que reproduit la carte du *Livre jaune*, et ceci conduit à parler du second épisode que j'ai évoqué : la note de lord Sanderson à lord Salisbury du 27 mars, soit à une date que je croyais être postérieure de six jours à la signature de la déclaration. Mais les révélations faites par M. Sohier le 7 juillet bouleversent les idées que j'avais sur ce point. Il ne s'agit pas vraiment d'un coup de théâtre mais quand même :

— En premier lieu, mon contradicteur a affirmé que lord Sanderson n'était pas ambassadeur à Paris et ne l'avait jamais été; je ne demande qu'à le croire; mais je dois tout de même indiquer que j'avais tiré mon savoir, apparemment erroné, des meilleures sources puisque c'est le paragraphe 4.60 du contre-mémoire de la Libye qui m'avait appris qu'il était "British Ambassador in Paris". Ce n'est pas grave.

— En second lieu, et ceci est infiniment plus lourd de conséquences, M. Sohier a également déclaré que lord Sanderson "happened to be in Paris when he sent this note [il s'agit de la note du 27 mars] ... *for the initialling of the Treaty*" (CR 93/28, p. 20).

Si tel est vraiment le cas, il s'agit-là d'une précision importante : cela signifie que lord Sanderson a eu connaissance de la carte du *Livre jaune* au moment où il est à Paris pour parapher le traité — et l'on sait qu'il connaît cette carte puisqu'il attire l'attention sur elle par la note dont la Partie libyenne fait si grand cas, en date du 27 mars; lord Salisbury n'y réagit pas autrement qu'en y apposant ses initiales ... lord Sanderson paraphe l'accord. Voici, assurément, qui renforce l'argumentation du Tchad qui a toujours considéré que la carte du *Livre jaune* constituait une interprétation particulièrement autorisée de la déclaration; si ce qu'a expliqué M. Sohier, sans citer ses sources, dans sa plaidoirie du 7 juillet est avéré, cette interprétation en devient authentique.

16. Oui mais, nous dit toujours M. Sohier, les cartes britanniques de l'époque portent, elles, le tracé mathématique. Ceci prouve peut-être une déficience dans la transmission des informations aux cartographes; au pire, un petit brin de duplicité de la part de l'administration britannique.

Au surplus, cette constance est moins grande que ne le dit mon contradicteur : la correspondance de McMichael à Vansittart le montre bien (voir par exemple l'annexe P12 au mémoire du tchad et l'annexe 42 à la réplique) : il en ressort que la majorité des cartes britanniques antérieures à 1914

> "used to follow the spirit of the 1899 Agreement and have this South-East line draw not due South-East but roughly in a South-Easterly direction" (mémoire du Tchad, annexe P12).

M. Sohier écarte ceci d'un revers de la main : basé au Soudan, McMichael "clearly had incomplete knowledge of the British maps issued" (CR 93/28, p. 20). Que sa connaissance fût incomplète, sans doute; mais, justement parce que McMichael était sur le terrain, proche de la région contestée — et Khartoum manifesta toujours moins d'indifférence pour celle-ci que Londres — ce haut fonctionnaire avait certainement avait certainement à sa disposition les cartes les plus utilisées et les plus précises. Il est au surplus fort intéressant qu'il ait constamment manifesté sa conviction, très motivée, de l'équivalence des lignes de 1899 et de 1919. Le Tchad, Monsieur le Président, ne peut que s'en sentir renforcé dans la sienne : la limite de 1899 et celle de 1919 sont identiques.

b) Une frontière opposable à la Libye

17. Cette ligne unique est-elle opposable à la Libye ? L'était-elle à l'Italie ?

La thèse fondamentale de nos contradicteurs est, bien sûr, qu'il n'en est rien puisque, d'une part, la ligne de 1899 n'est pas même la limite d'une zone d'influence et que, d'autre part, l'Italie, qui n'est pas partie à la convention supplémentaire de 1919, a toujours protesté contre la frontière qu'arrêtait cet instrument.

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La discussion semble pouvoir être assez étroitement circonscrite car un certain nombre de points me paraissent acquis :

1) la limite de 1899 s'est consolidée en une frontière du fait de la prise de possession effective par la France de la zone d'influence que la Grande-Bretagne lui avait reconnue — je ne reviens pas là-dessus, j'en ai parlé hier;

2) les lignes de 1899 et 1919 sont identiques; nous venons de voir que les arguments présentés par la Libye lors de sa réplique orale confortent cette thèse; dès lors,

3) si l'Italie a reconnu le tracé de 1899, celui de 1919 lui est également et *ipso facto* opposable. Je sais bien que ce n'est pas l'avis des conseils de la Partie libyenne (voir CR 93/29, p. 64); mais ils partent du postulat erroné que les deux lignes sont distinctes et ce n'est certainement pas parce que l'Italie a protesté contre la frontière de 1919 que cette erreur serait devenue une vérité.

18. Je crois avoir montré tout à l'heure que, par les accords de 1900-1902, la France et l'Italie avaient reconnu — dans leurs rapports *inter se* — les frontières de la Tripolitaine. Si ces frontières avaient jouxté la zone française sur toute son étendue, du même coup elles auraient également constitué la frontière de cette zone.

Mais, comme on le voit sur la carte du *Livre jaune*, ceci n'est exact que pour le secteur occidental de la frontière. A partir de l'intersection du tropique du Cancer et du 16° méridien, ces lignes divergent, vers le nord-est et vers le sud-est.

Tout occupés par le "coup de théâtre" qu'il sont cru déceler dans ma précédente plaidoirie, mes contradicteurs affirment que le Tchad admet dès lors que la ligne de 1899 n'était pas opposable à l'Italie (voir par exemple CR 93/28, p. 30-31). Je n'ai, à vrai dire, pas dit cela. Le 29 juin dernier, j'ai au contraire souligné que le ministre italien des affaires étrangères, Prinetti, connaissait la carte de 1899 et avait exigé qu'elle fût expressément mentionnée dans l'échange de lettres du 1er novembre 1902 et que dès lors l'Italie ne pouvait plus, de bonne foi, contester le tracé de la zone française qui figure sur cette carte.

J'avais seulement fait observer que cette reconnaissance ne découlait pas d'une interprétation littérale de l'accord de 1902 (CR 93/23, p. 34-35). Ceci, qui était vrai le 29 juin, le demeure le 13 juillet...

19. *Quid* cependant, si l'on s'en tient à une interprétation littérale ? Comme je l'ai dit aussi il y a quinze jours : il en résulte une liberté plus grande encore de la France — au moins vis-à-vis de l'Italie—, puisque, du moment qu'elle n'empiète pas sur le territoire du *vilayet* de Tripoli, la France est libre de ses mouvements sans que l'Italie soit fondée à protester contre une éventuelle extension de l'expansion française.

Le professeur Condorelli exerce son ironie contre ce qu'il croit être la "nouvelle thèse" du Tchad. Comment, nous dit-il, la France a obtenu de l'Italie la reconnaissance d'une sphère d'influence qui s'étend jusqu'aux frontières de la Tripolitaine-Cyrénaïque et elle ne réagit pas lorsque l'Italie sort de ces frontières ? Et (cette fois je le cite) : "Est-il crédible que la France se soit publiquement réjouie de ce qui constituait les violations par l'Italie des droits qu'elle avait envers cette même Italie ?" (CR 93/28, p. 38).

Mon fougueux contradicteur va peut-être un peu vite ! La France a des droits, certes ! Mais elle a aussi une politique, des intérêts et des obligations à l'égard de la Grande-Bretagne. Sa politique, fort constante, et ses intérêts sont clairs : ils sont d'assurer la continuité de son empire colonial des rives de la Méditerranée à celles du Congo et de garantir la sécurité de ses possessions autour du lac Tchad, ce qui est réalisé par le glacis protecteur des hauteurs du Tibesti et du Borkou. On voit mal pourquoi elle protesterait, du moment que l'Italie ne s'aventure pas au-delà. J'ai d'ailleurs bien retenu les leçons du professeur Crawford lors du premier tour de plaidoiries; il nous a dit que :

> "Since the sphere of influence agreement is merely a bilateral treaty obligation [the acquisition of territory by one of the contracting party on the wrong side of the line] would be legally effective as against the world. Vis-à-vis the other State party, the acquisition ... might be cured by recognition by the injured State, or it might be simply ignored." (CR 93/19, p. 51.)

Au pire, l'on pourrait admettre que c'est ce qui s'est produit du fait du silence de la France face à l'avancée des Italiens vers le sud.

20. Mais, en réalité, les Français ne pouvaient, juridiquement, pas protester : par la déclaration de 1899, la France s'était engagée, vis-à-vis de la Grande-Bretagne, à ne pas étendre sa zone d'influence au-delà de la limite fixée alors. Soit, ironise à nouveau le professeur Condorelli !

Mais la Grande-Bretagne elle-même n'a pas protesté face à l'avance italienne (CR 93/28, p. 37).

Ceci, à vrai dire, c'est l'affaire de la Grande-Bretagne, pas de la France; et l'on sait à quel point, dès l'origine, Londres se montre peu empressée pour occuper les arpents de sable du désert libyen. Au demeurant, ce n'est tout de même que par l'accord de Rome du 30 juillet 1934 que la Grande-Bretagne va renoncer à ses prétentions.

21. Monsieur le Président, il est temps pour moi de résumer les principaux éléments que l'on peut dégager de ces analyses en ce qui concerne le tracé du secteur oriental de la frontière tchado-libyenne :

premièrement, l'article 3 de la déclaration franco-britannique du 21 mars 1899 fixe de façon très claire le point de départ de ce secteur à l'intersection du tropique du Cancer et du 16° méridien est;

deuxièmement, il est impossible d'interpréter la ligne descendant "dans la direction du sud-est" décrite de façon approximative par cette disposition, de façon stricte et mathématique : ceci est totalement incompatible avec les travaux préparatoires de l'accord et, notamment, avec le compromis qui est intervenu le 19 mars 1899;

troisièmement, ceci est également exclu par la carte du *Livre jaune*, établie aussitôt après la conclusion de la déclaration et vraisemblablement même, selon la Partie libyenne, avant ou au moment où elle était paraphée par lord Sanderson; cette carte, en tout cas aussitôt connue des Britanniques et contre laquelle ils n'ont pas protesté, constitue une interprétation authentique du texte de l'accord et figure, pour ce qui nous intéresse, une ligne dans la direction du sud-est, qui aboutit au 24° méridien à peu près — il s'agit, il ne faut pas l'oublier, d'une carte au 1/12 000 000e —, à peu près donc, à la hauteur du 19° parallèle nord;

quatrièmement, cette interprétation est en tous points confirmée par la convention supplémentaire du 8 septembre 1919, qui fixe ce point terminal de la frontière à l'intersection du 24e degré de longitude est avec le parallèle 19° 30' de latitude;

cinquièmement, l'Italie, qui avait eu connaissance de la carte du *Livre jaune* et avait même exigé qu'elle soit expressément mentionnée par l'échange de lettres du 1er novembre 1902, n'a jamais,

avant 1919, protesté contre cette ligne et ne pouvait, de bonne foi, la contester;

sixièmement, en tout état de cause, ce pays, qui avait accepté que la limite de l'expansion française en Afrique septentrionale fût constituée par la frontière de la Tripolitaine indiquée sur la carte de 1899, ne pouvait pas s'opposer à cette expansion du moment que la France ne dépassait pas cette limite; et

septièmement et enfin, dès lors que la france s'était effectivement établie dans la zone qui lui avait été reconnue, les limites de celle-ci constituaient les frontières de ses possessions coloniales; celles-ci sont bien celles prévues par la déclaration de 1899 et la convention de 1919.

22. Toutefois, Monsieur le Président, je souhaite, pour terminer, revenir à l'essentiel car, décidément, il ne faut pas perdre de vue le traité franco-libyen de 1955. Il simplifie beaucoup la problématique puisqu'il résout, de la manière la plus simple encore une fois, le problème de l'existence et de l'opposabilité de la frontière à la Libye : celle-ci existe et lui est opposable puisque les deux parties — dont la Libye — décident qu'il en est bien ainsi. Il simplifie aussi la question du tracé même de la frontière en renvoyant à la fois à la déclaration de 1899 et à la convention de 1919, qui en constituent l'interprétation authentique.

Monsieur le Président, Messieurs les juges, je vous remercie de votre patiente attention et, si vous le voulez bien, Monsieur le Président, le professeur Cassese me succédera pour préciser brièvement certains points relatifs au traité mort-né de 1935 et à certains incidents qui confirment le tracé que je viens de décrire.

Je vous remercie, Monsieur le Président.

The PRESIDENT : Thank you, Professor Pellet. Professor Cassese.

M. CASSESE :

I. INTRODUCTION

1. Monsieur le Président, Messieurs les juges, le professeur Pellet a montré hier que l'article 3 du traité de 1955 n'exclut en rien le recours aux effectivités. L'examen des effectivités montre que la délimitation des sphères d'influence, opérée par les conventions de 1899 et 1902, s'est progressivement transformée, dans la pratique, en une délimitation de frontière. Il est d'ailleurs symptomatique que la convention anglo-française de 1919 parle de "frontières des possessions coloniales anglaises et françaises".

Avec votre permission, Monsieur le Président, je vais donc revenir une dernière fois sur les effectivités — ce sera la dernière fois, je vous assure, Monsieur le Président — *en tant que confirmation du titre conventionnel français cette fois*. Comme le Tchad s'est déjà longuement penché sur cette question, aussi bien dans ses écritures qu'à l'occasion du premier tour des plaidoiries, je me bornerai à revenir sur les trois principaux épisodes : le traité Laval-Mussolini de 1935, et les incidents de Jef-Jef de 1938 et d'Aouzou de 1955.

Ces trois épisodes revêtent en effet une importance particulière.

Le traité de 1935 marque un tournant dans l'affaire qui nous occupe. L'Italie, qui avait jusque-là protesté contre la présence française dans le BET, change son fusil d'épaule.
En signant cet accord, elle reconnaît indirectement que le territoire qui lui est cédé était sous souveraineté française. Certes, le traité n'entrera jamais en vigueur, mais cette reconnaissance, elle, demeurera, comme en témoigne l'incident de Jef-Jef. La Libye ne se comportera pas différemment à l'occasion de l'incident d'Aouzou.

Messieurs de la Cour, quoi qu'en dise la Libye, la valeur de ces épisodes tient à leur *convergence*. Tous montrent que la bande d'Aouzou se trouvait sous l'emprise souveraine de la France, et que, pour *toutes les parties concernées*, il n'y avait qu'une *seule* frontière, qui correspondait à la ligne tracée par les accords de 1899-1919.

2. LE TRAITE LAVAL-MUSSOLINI (1935)

2. Monsieur le Président, je commencerai donc par le traité Laval-Mussolini.

Dans ma plaidoirie du 30 juin, j'ai mis en exergue le fait que, pour la France et l'Italie, le traité de 1935 visait à céder à l'Italie une portion de territoire soumise à la souveraineté française, ce que nous appelons aujourd'hui "la bande d'Aouzou".

Mais de l'autre côté de la barre, on a réplique que, *bien sûr*, les Italiens et les Français ont parlé à l'époque, et dans les années qui suivirent, d'une *cession* de la bande d'Aouzou à l'Italie; *cependant*, disent-ils, lorsqu'ils ont utilisé cette expression, ils lui ont donné un sens différent.

Par cession, nous dit-on, les Français entendaient une translation de souveraineté (et naturellement, ils ne prenaient cette position que pour des raisons tactiques, dictées par ce que nos contradicteurs appellent la "stratégie de négociation française"). En revanche, les Italiens donnaient une toute autre signification à cette expression *cession* : d'après la Partie libyenne, ils entendaient par là que :

> «l'application du traité de Rome ... aurait effectivement impliqué un *retrait des forces militaires françaises* des quelques localités de la zone nord de la ligne de 1935 où elles venaient de s'installer, et simultanément une remise de ces localités entre les mains italiennes" (CR 3/28, p. 45; les italiques sont de nous).

Donc, d'après nos contradicteurs, pour les Italiens, le terme *cession* évoquait une simple *opération militaire* : l'évacuation par les Français de la bande d'Aouzou et non pas un transfert du titre souverain.

3. Monsieur le Président, cette interprétation procède d'un syllogisme très simple : *primo*, les Français n'avaient pas de titre souverain sur la zone; *secundo*, ils ne pouvaient donc pas transférer de titre aux Italiens; *tertio*, et par voie de conséquence, il faut interpréter le terme *cession* comme une simple évacuation militaire d'une zone occupée à titre provisoire. Ainsi, Monsieur le Président, tout le raisonnement repose sur une simple *pétition de principe*; à savoir l'affirmation erronée selon laquelle la France ne jouissait pas de droits souverains sur le BET.

Cette pétition de principe conduit nos éminents collègues de l'autre côté de la barre à interpréter l'expression *cession* d'une manière fort surprenante, qui va à l'encontre de l'acception habituelle du terme.

4. En effet, lorsque l'on parle de cession dans les relations internationales, on envisage

nécessairement la

> "renonciation faite par un Etat, en faveur d'un autre Etat, aux droits et titres que pourrait avoir [à un] territoire le premier de ces Etats" (ce sont les mots d'une sentence arbitrale du 3 septembre 1924, RSA, vol. I, p. 443).

Et, Messieurs les juges, vous trouverez la même définition non seulement dans d'autres sentences internationales, par exemple celle du 16 mars 1956 de la commission de conciliation franco-italienne (RSA, vol. XIII, p. 642-658), mais encore dans les dictionnaires juridiques les plus connus : par exemple, celui du Basdevant (*Dictionnaire de la terminologie du droit international*, Paris, 1960, p. 109-110), le *Vocabulaire juridique* de l'association Henri Capitant (Paris, 1990, p. 125) et le *Manuel de la terminologie du droit international public* (Bruxelles, 1983, p. 208).

Tous les manuels italiens de droit international de l'époque, par exemple ceux de Fiore (*Trattato di diritto internazionale publico*, 3e éd., Torino, 1987, vol. I, p. 219-230); Diena (*Diritto internazionale*, I, 2e éd., Napoli, 1914, p. 229-236; 3e éd., Milano, 1930, p. 268-276); Cavaglieri (*Règles du droit de la paix, Recueil des Cours* (1929-I), p. 412-413, 416 et suiv.); Santi Romano (*Corso di diritto internazionale*, Roma, 3e éd., 1933, p. 176-177); Balladore Pallieri (*Diritto internazionale publico*, Milano, 1937, p. 419-421), tous définissent la cession comme le transfert d'un titre territorial par l'Etat détenteur de la souveraineté.

La même position était soutenue par la doctrine non italienne de l'époque, par exemple, l'Autrichien Verdross (*Règles générales du droit international de la paix, Recueil des Cours* (1929-V), p. 347-377), ou l'Allemand Strupp (*Les règles générales du droit de la paix, Recueil des Cours* (1934-I), p. 485-491).

Pourquoi les diplomates italiens se seraient-ils éloignés de l'usage courant ?

5. A moins, bien sûr, que la Partie libyenne ne suppose que les diplomates, les jurisconsultes et les responsables politiques italiens de l'époque aient été incapables de manier les termes juridiques les plus élémentaires et les plus connus.

6. Mais il y a une raison encore plus substantielle pour estimer que le traité Laval-Mussolini visait à transférer à l'Italie un bout de territoire soumis à la souveraineté française. Déjà, à la conférence de la paix, en 1919, les autorités italiennes avaient officiellement reconnu que le BET

était soumis à l'autorité souveraine de la France, en demandant que celle-ci

> "lui cède ... les territoires sahariens du Tibesti, du Borkou et de l'Ennedi tous *[sic]* entiers, dans leurs délimitations géographiques et ethniques" (mémoire du Tchad, annexe 9, p. 926).

Cela, Monsieur le Président, fut répété par le ministre italien des affaires étrangères, Tittoni, à la chambre des députés (mémoire du tchad, annexe 337), toujours en 1919.

7. Tout cela, Monsieur le Président, confirme notre lecture du traité Laval-Mussolini. Tant du point de vue juridique que du point de vue historique, cet accord, le traité Laval-Mussolini, n'a de sens que si on l'interprète comme une *cession* par la france des droits souverains qu'elle détenait sur la bande d'Aouzou. Le traité partait du principe que la bande d'Aouzou, dans les limites définies en 1899-1919, appartenait à la France. Son élaboration et sa signature ont donc *confirmé* et *renforcé* la ligne frontière établie en 1899-1919.

3. L'INCIDENT DE JEF-JEF

8. Monsieur le Président, cette confirmation devait se manifester d'une manière encore plus éclatante en 1938, lors de l'incident de Jef-Jef. J'en viens ainsi au *deuxième point* de ma plaidoirie.

Comme j'ai déjà traité amplement de cet épisode lors de ma plaidoirie du 30 juin, point n'est besoin pour moi d'y revenir longuement. Permettez-moi toutefois, Monsieur le Président, un bref rappel des faits et quelques réponses aux critiques de nos contradicteurs.

9. En deux mots, l'épisode consiste en ceci : à trois reprises, un petit groupe d'Italiens, des ouvriers d'abord et des militaires ensuite, se rend à Jef-Jef, au coeur de la bande d'Aouzou, pour y creuser un puits. A chaque reprise, ils sont expulsés par les militaires français. Par la suite, l'Italie expliquera au Quai d'Orsay les raisons pacifiques de ces intrusions sans jamais avancer *la moindre prétention juridique*, tandis que la France réaffirmera dans les termes les plus nets sa souveraineté sur la zone.

10. Nos contradicteurs, de toute évidence gênés par cette affaire, font semblant de ne pas avoir lu les documents pertinents, tant français qu'italiens. Ainsi, par exemple, mon éminent collègue le professeur Bowett a dit que cet incident fait ressortir un seul fait, à savoir "unarmed Italian workmen chose not to argue with armed French soldiers" (CR 93/29, p. 53).

Or, cette affirmation est contredite par tous les documents relatifs à cet incident qui montrent que les deuxième et troisième incursions italiennes furent menées par des militaires italiens. Du reste, ce point a été admis par un des collègues du professeur Bowett, à savoir le professeur Condorelli (CR 93/28, p. 48-49).

11. En revanche, ce dernier semble avoir parcouru d'un oeil distrait les documents pertinents lorsqu'il affirme que les Italiens avaient envoyé une "protestation" à la France (*ibid.*, p. 48).

Bien que le gouverneur italien de la Libye, Italo Balbo, ait instamment pressé Rome de protester, Rome se contenta d'inviter l'ambassade italienne à Paris à "entretenir" ("intrattenere") le Quai d'Orsay de ces événements (mémoire du Tchad, annexe 197), et de fait, l'aide-mémoire italien est une note d'explication polie, très modérée, dans laquelle on souligne les motivations pacifiques de l'initiative italienne et il n'y a pas l'ombre de la moindre protestation.

12. Nos contradicteurs font aussi valoir qu'ils n'ont pas trouvé trace, dans les documents pertinents, d'une reconnaissance de la souveraineté française par les militaires italiens à l'occasion de la troisième incursion à Jef-Jef.

Sans doute, pressés par le temps, nos collègues n'ont-ils pas achevé la lecture du document dans lequel cet épisode est rapporté.

S'ils l'avaient fait, ils auraient noté qu'on y dit en toutes lettres que "[le] lieutenant italien Greco reconnaît formellement [que] le Rocher Noir (Jef-Jef) [est] situé en territoire français" (contre-mémoire du Tchad, annexe 83, p. 545). Voilà bien une reconnaissance *explicite* de la souveraineté française sur la bande d'Aouzou.

13. Au demeurant, *les marques concrètes de cette souveraineté furent présentes à tout moment*, contrairement à ce qu'avancent nos contradicteurs qui, là encore, donnent l'impression de ne lire que la moitié de chaque document.

Vous vous rappellerez que "les marques de souveraineté italienne" triomphalement annoncées par la Partie adverse se réduisaient en fait à du papier à en-tête italien que l'on avait laissé dans des tonneaux près de Jef-Jef. Nos contradicteurs affirment que les Français se bornèrent à remplacer le papier à en-tête italien par du papier à en-tête français (CR 93/28, p. 50).

Malheureusement pour eux, si vous lisez les deux télégrammes jusqu'au bout, vous verrez que les Français ajoutent :

> «Groupe [militaire] permanent avec lieutenant et T.S.F. [télégraphe sans fil] se retranche sommet Jef-Jef où flotte drapeau tricolore." (Contre-mémoire du Tchad, annexe 83, p. 540 et 542.)

Voilà, Monsieur le Président, de véritables marques de souveraineté : un groupe "*permanent*" des militaires en armes, un appareil radio, le drapeau français. Le contraste, Monsieur le Président, est criant : d'un côté du papier à en-tête, de l'autre des manifestations indiscutables d'autorité souveraine.

14. Enfin — et je dirais même surtout — à l'occasion de l'incident de Jef-Jef, l'Italie reconnaîtra explicitement que la ligne 1899-1919 constituait la frontière méridionale de la Libye. Cela résulte sans équivoque possible du croquis que le gouverneur général de la Libye, Italo Balbo, envoya de Tripoli à Rome (mémoire du Tchad, annexe 203), et de l'aide-mémoire que l'ambassadeur italien à Paris fit parvenir au Quai d'Orsay (mémoire du tchad, annexe 199).

Ces deux documents présentent clairement le tracé de 1899-1919 comme la frontière sud de la Libye.

4. L'INCIDENT D'AOUZOU (1955)

15. Monsieur le Président, j'en arrive ainsi à l'incident d'Aouzou, qui remonte vous le savez à 1955. Comme je l'ai dit dans ma plaidoirie du 1er juillet, en février 1955 une mission civile libyenne, escortée par des militaires, fut interceptée par les soldats français à Moya, à 10 kilomètres au nord d'Aouzou, et immédiatement reconduite à la frontière. Le Quai d'Orsay protesta formellement contre cette violation flagrante de la souveraineté française, à la suite de quoi le président du conseil libyen, Ben Halim, reconnut — et sans la moindre réserve — que la zone était soumise à l'autorité française.

16. Voilà les faits, Monsieur le Président. Contrairement à ce qu'affirme la Partie adverse, ils sont loin d'être obscurs ou controversés. Ils sont établis de la manière la plus claire dans une réponse écrite du ministre français des affaires étrangères, M. Pinay, à un parlementaire français (mémoire du tchad, p. 285-286) — une réponse que la Partie adverse passe nonchalamment sous silence malgré la profusion de détails précis que cette réponse offre.

En vérité, le traitement de cette affaire par la Partie adverse a de quoi surprendre. Au premier tour des plaidoiries, les conseils de la Libye n'ont pas soufflé mot de l'incident. Au deuxième tour, sir Ian Sinclair s'est borné à noter que notre version de l'épisode était "colorée", et a renvoyé les juges au contre-mémoire (CR 93/27, p. 52-53).

Ensuite, le professeur Bowett, après avoir relevé que la cour avait entendu "more than enough" sur cet incident, lui a consacré quatre, je dis bien quatre, lignes.

Monsieur le Président, je sais que nos amis Britanniques ont un penchant marqué pour le "understatement". Mais il me semble que, dans ce cas, on a plutôt affaire à ce procédé qu'ont si bien décrit Agatha Christie ou P. D. James, dans la grande tradition britannique des romans de série noire : le recel hâtif d'un cadavre encombrant.

Oui, Monsieur le Président, l'épisode d'Aouzou constitue un cadavre encombrant pour la Partie adverse, car il révèle au moins quatre indices essentiels : *primo*, six mois seulement avant la signature du traité du 10 août 1955, on confirme à nouveau la souveraineté française sur la bande d'Aouzou; *secundo*, cette reconnaissance est le fait non plus de l'Italie, mais de l'Etat successeur, la Libye; *tertio*, cette reconnaissance émane de la plus haute autorité de la Libye, le président du Conseil Ben Halim; *quarto*, la France, dans ses protestations, insiste sur la frontière existante, telle qu'elle résulte des "actes internationaux", à savoir les accords de 1899-1919. La reconnaissance libyenne, de Ben Halim, intervenant après les protestations françaises, s'étend donc à cette ligne frontière.

Du reste, la position adoptée par le président Ben Halim à l'occasion de l'incident d'Aouzou devait être pleinement confirmée dans les semaines qui suivirent. En effet, au cours des négociations du traité d'amitié de 1955, Ben Halim reconnut que les accords existants devaient être appliqués et que cela excluait la ligne prévue par l'accord de 1935 (voir mémoire du Tchad, annexe 268).

17. Monsieur le Président, je ne crois pas utile de répondre point par point aux objections formulées par le contre-mémoire libyen, auquel sir Ian Sinclair a renvoyé la cour, car l'attitude de nos contradicteurs tient du rituel incantatoire. En répétant à l'envi qu'il ne s'agit là que d'un incident banal, dépourvu de signification réelle, ils s'efforcent de se convaincre de ce qu'il ne peut miner leurs

fragiles échafaudages juridiques — dans le vain espoir que la Cour les suivra sur ce terrain.

La vérité est que la Libye n'a pas été en mesure d'offrir un seul motif valable pour lequel la valeur probante de cet incident ne devrait pas être retenue.

18. Un mot, toutefois, sur ce que la Partie adverse considère comme le coup fatal à notre thèse. D'après nos contradicteurs, l'affaire ne pourrait avoir de valeur que par rapport au seul village d'Aouzou (contre-mémoire de la Libye, par. 8.47, et CR 93/29, p. 54).

La réponse, Monsieur le Président, est facile. Aouzou est la seule localité importante de la région : ce n'est pas par hasard que l'on parle de la "bande d'Aouzou". Je rappellerai à ce sujet ce que j'ai dit dans ma plaidoirie du 30 juin à propos des modalités de l'occupation française : qui tient les oasis tient la région.

Aurait-il fallu attendre qu'une série d'incidents s'étende aux autres localités de la zone — des villages minuscules — et aux landes arides du désert, pour pouvoir dire que l'ensemble de la région relève de la souveraineté française ? Les protestations françaises et la réponse libyenne étaient tout à fait claires : elles montraient à l'évidence que la question était posée par rapport à l'ensemble de la bande d'Aouzou. Du reste, la bande d'Aouzou a toujours été conçue et traitée comme un tout et cela par toutes les parties concernées.

CONCLUSION

19. En vérité, Monsieur le Président, la manière dont la Partie adverse traite cet incident d'Aouzou évoque un tableau du célèbre peinte surréaliste belge, René Magritte. Le tableau, que vous pouvez admirer au musée de Los Angeles, représente, sur un fond jaune pâle, une grosse pipe en céramique, au-dessous de laquelle trône une cartouche qui dit "Ceci n'est pas une pipe". Monsieur le Président, nos contradicteurs se sont livrés au même genre d'escamotage surréaliste.

La négation de la réalité avait, pour Magritte, des motivations philosophiques, comme l'a fort bien expliqué Michel Foucault dans un essai qu'il a consacré à ce tableau. En revanche, dans un procès devant la plus haute juridiction mondiale, nier les faits est inutile et vain : les faits sont là, incontournables, et on ne saurait les faire disparaître par un tour de passe-passe.

20. Les faits, je crois l'avoir montré, attestent l'emprise souveraine de la France sur la bande d'Aouzou — tout au long de la période concernée. Ils confirment aussi, de la façon la plus nette, la reconnaissance par toutes les parties intéressées — je dis bien *toutes* : Libye comprise — de ce que le tracé qui avait été établi pour la première fois par les accords de 1899-1919 constituait bel et bien la frontière méridionale de la Libye.

Monsieur le Président, je vous remercie de votre patiente attention, et vous prie de bien vouloir donner la parole à mon collègue le professeur Pellet. Merci.

The PRESIDENT : Thank you very much, Professor Cassese. According to your programme, the break was to be now. Would you like to start now and do what you can before the break ?

Mr. PELLET : Mr. President, I need less than 10 minutes.

The PRESIDENT : Carry on, please.

Mr. PELLET : Thank you very much, Mr. President.

Monsieur le Président, Messieurs les juges, reprenant ma casquette de guide, il m'appartient d'introduire maintenant la troisième partie de nos plaidoiries. Elle sera consacrée à un examen du traité de 1955 à la lumière des débats pertinents dans les enceintes internationales et de la pratique des deux Etats.

1. Monsieur le Président, jusqu'ici nous avons examiné la préhistoire du traité du 10 août 1955.

Après avoir évoqué le faux problème du titre originaire et montré que seule la France avait, durant toute la période coloniale, agi à titre de souverain dans la région revendiquée par la Libye, les conseils du Tchad ont montré que les accords conclus entre 1899 et 1919, ceux-là mêmes auxquels se réfère le traité de 1955, ont défini une ligne, devenue frontière, et que la pratique ultérieure de la France et de l'Italie a été, en tous points, conforme à cette présentation. Le professeur Cassese vient de le montrer.

2. Toutefois, j'ai eu l'occasion de le rappeler à plusieurs reprises, il s'agit là de détours

inutiles : le traité de 1955, à lui seul, permet à la Cour de trancher la question qui lui est soumise. Cette approche est la plus simple, elle s'inscrit en outre tout naturellement dans le contexte historique.

La seconde guerre mondiale constitue en effet une rupture décisive, à la fois historiquement et juridiquement : l'Italie renonce à tous ses droits et titres sur ses anciennes colonies. En conséquence, le processus de décolonisation de la Libye se met en place sous l'autorité d'abord des quatre puissances, puis de l'Assemblée générale des Nations Unies. La Libye devenue indépendante conclut avec ses voisins des traités, qui achèvent de la doter de frontières conventionnelles incontestables — que celles-ci aient ou non existé auparavant.

3. Le traité du 10 août 1955 s'inscrit dans cette perspective. Le cadre de négociation est fixé par l'Assemblée générale des Nations Unies qui, en ce qui concerne les frontières, se borne à poser le principe fondamental de la succession au colonisateur italien, alors que certains milieux français auraient souhaité des rectifications à cette occasion; mais l'Assemblée générale reste prudente. Elle se borne à faire les recommandations de procédure nécessaires pour enclencher les négociations directes entre les parties concernées. L'étude du Secrétariat de l'ONU de 1950 embrouille les choses plus qu'elle ne les simplifie, et ceci en ce qui concerne les frontières de la Libye, aussi bien avec l'Egypte qu'avec les possessions françaises d'Afrique.

La résolution 392 (V) se garde de se prononcer sur le tracé de la frontière. La France a fait connaître ses vues; la résolution ne les confirme pas formellement, pas plus qu'elle ne les infirme. L'Organisation se contente de demander aux parties d'entrer en négociation pour délimiter les frontières là où les traités antérieurs ne l'auraient pas fait.

4. Conclu entre deux Etats souverains, le traité du 10 août 1955 ne fait pas référence à la résolution 392 (V) et ne se limite pas non plus à régler le problème des frontières. Il n'apparaît donc pas, au point de vue juridique, comme un instrument d'exécution de la résolution. Mais, il en satisfait l'objectif politique : il définit les frontières entre les deux parties sur la base des traités en vigueur.

5. Tout, dans le comportement des parties, témoigne de leur sentiment partagé que leur

frontière commune est délimitée.

Le Tchad a exprimé minutieusement les débats qui ont eu lieu aux Nations Unies durant la période de supervision du processus de décolonisation : la Libye n'y formule *aucune* revendication sur l'Afrique équatoriale française. L'analyse des travaux préparatoires du traité de 1955 conduit, elle aussi, à la seule constatation de l'existence d'un accord entre les parties sur l'emplacement de la frontière. Même constat lorsque, en 1960, le Tchad fait son entrée dans la communauté internationale en tant qu'Etat indépendant : ni aux Nations Unies, ni ailleurs, pas la moindre trace du plus petit début de contestation du *statu quo* par la Libye; pas l'ombre d'une revendication.

6. La situation change radicalement au début des années soixante-dix.

Le changement de régime politique en Libye et la guerre civile au Tchad modifient les données du problème. Le Tibesti échappe au contrôle des autorités de N'Djaména et, profitant de l'occasion, la Libye s'empare de la bande d'Aouzou.

C'est alors que se noue le contentieux territorial. Pour cette raison, l'année 1973 peut-être considérée comme une autre date critique, après — mais pour d'autres raisons — 1951, 1955, 1960. En effet, à partir de 1973, le contentieux territorial est gelé.

7. Sans doute, comme l'a rappelé la Chambre de la Cour qui a tranché en 1992 le *Différend frontalier* entre El Salvador et le Honduras,

> "Si la situation résultant de l'*uti possidetis juris* peut être modifiée par une décision d'un juge et par un traité, la question se pose alors de savoir si elle peut être modifiée d'autres manières, par exemple par un acquiescement ou une reconnaissance. Il n'y a semble-t-il aucune raison, en principe, pour que ces facteurs n'entrent pas en jeu, lorsqu'il y a assez de preuves pour établir que les parties ont en fait clairement accepté une variante, ou tout au moins une interprétation, de la situation résultant de l'*uti possidetis juris*." (*C.I.J. Recueil 1992*, p. 401.)

En va-t-il de même lorsque cette situation a été cristallisée par un traité, comme c'est le cas dans notre affaire ? Sans doute pas ... mais il n'est pas nécessaire de trancher la question : l'usage de la force entache les activités de la Libye sur le terrain d'une présomption irréfragable d'illicéité.

Il est du reste extrêmement significatif que la Partie libyenne se soit bien gardée d'évoquer quelque effectivité que ce soit dans la bande d'Aouzou, alors qu'elle contrôle militairement la région depuis 1973 : c'est qu'elle sait bien que de tels actes d'occupation militaire ne sauraient changer les

données juridiques de l'affaire.

8. Sur quoi, alors, se fonde la Libye ?

Si l'on se réfère à son attitude dans les enceintes multilatérales, en particulier aux Nations Unies, on peut avoir l'impression qu'elle estimait qu'elle tenait un titre territorial du traité Laval-Mussolini de 1935. Elle s'est employée à l'établir par référence à certaines des cartes du Secrétariat de 1950, établies sur la base du traité. Telle fut sa position, exposée de mauvaise grâce à l'ONU, à partir de 1978, et à l'OUA en 1988 — bien qu'en même temps elle eût prié ces instances de se mêler de ce qui les regardait.

Au moins le Tchad pouvait-il penser qu'il savait à peu près, à ce moment-là, de quoi il retournait.

Il n'était pas cependant au bout de ses surprises : en procédure, la Libye abandonne ses positions antérieures; depuis le début de cette procédure, en 1991, elle ne s'appuie plus, vous le savez, Messieurs les juges, ni sur le traité de 1935 ni sur les cartes de 1950 et elle transforme radicalement la portée et la nature du différend.

9. Monsieur le Président, Messieurs les juges, les professeurs Franck et Sorel vont exposer ce que, après la préhistoire dont nous avons parlé, on peut considérer comme l'histoire contemporaine du traité du 10 août 1955.

Dans un premier temps, M. Franck retracera les débats qui ont eu lieu dans les instances internationales avant la signature du traité; puis, dans un second temps, il évoquera la manière dont les Nations Unies et l'OUA ont appréhendé le contentieux territorial dont le Tchad les avait saisies. Entre ses deux interventions, M. Sorel examinera les relations bilatérales entre les Parties.

Monsieur le Président, après la pause que je suis navré d'avoir fait reculer un petit peu, je vous demande de bien vouloir donner la parole au professeur Thomas Franck.

The PRESIDENT : Thank you very much, Professor Pellet. We' ll take our break now. Thank you.

L'audience est suspendue de 11 h 20 à 11 h 35.

The PRESIDENT : Thank you. Professor sorel.

M. SOREL :

LA PRATIQUE DU TCHAD ET DE LA LIBYE

Monsieur le Président, Messieurs les juges.

C'est de nouveau un honneur de me présenter devant vous. Je le dois à la Partie adverse puisque celle-ci m'oblige à revenir sur certains points.

En effet, selon une technique éprouvée, nos honorables contradicteurs distillent quelques contre-vérités en vue de créer une "atmosphère" qui leur serait favorable, et ceci à défaut de fondements réels.

A cet égard, je souhaiterais revenir sur deux aspects complémentaires, et ceci, brièvement.

Ces deux aspects concernent, d'abord, l'administration par le Tchad — je dis bien par le Tchad et non par la France — de la région objet du litige après l'indépendance de cet Etat et, d'autre part, les relations bilatérales entre la Libye et le Tchad durant les années soixante-dix.

Je ne reviendrai pas sur l'ensemble de ces aspects mais simplement sur des points précis évoqués lors du deuxième tour de plaidoirie par la Libye.

Même si, globalement, la Partie adverse semble renvoyer "dos à dos" les deux Etats (CR 93/29, p. 54) concernant la période postérieure à 1955, cette "impression" est d'une part contrebalancée par des insinuations dont certains sont inacceptables pour le Tchad, et d'autre part, cette apparente "bienveillante neutralité" tend à occulter les nombreuses réactions tchadiennes face à l'attitude de la Libye durant la période récente.

I. QUELQUES PRECISIONS A PROPOS DES ACTES SOUVERAINS DU TCHAD SUR LA BANDE D'AOZOU

Tout en reconnaissant — l'inverse paraît difficile ! — la présence effective du Tchad sur tout le BET — y compris la bande d'Aozou — après 1960, nos honorables contradicteurs cherchent à en minimiser singulièrement la portée.

Sans doute, craignent-ils le constat que l'on peut établir quant à la "pratique ultérieurement

suivie dans l'application d'un traité", selon les termes de l'article 31 de la convention de Vienne rappelés par le professeur Pellet hier.

Il est vrai que ces effectivités confirment amplement la frontière résultant du traité du 10 août 1955.

Le professeur Bowett a qualifié Aozou de "small village" (CR 93/29, p. 54) — comme l'a rappelé le professeur Cassese — qui ne représenterait qu'une minuscule localité dans la bande qui porte son nom. Certes, il ne s'agit que d'une localité sur ce vaste territoire mais, outre la valeur symbolique — ce lieu donnera son nom à la bande — il faut rappeler que la configuration géographique implique une population clairsemée et peu nombreuse localisée dans les palmeraies, et fluctuant selon les déplacements de population dus au nomadisme.

N'en déplaise à nos contradicteurs, Aozou est bien la principale palmeraie dans la bande qui porte son nom.

Cet "effet de langage" — ce "small village" — tend à faire croire que les effectivités à Aozou seraient quantité négligeable. Or, elles sont, au contraire *fondamentales*, justement parce qu'il s'agit d'un lieu où l'on peut en vérifier la véracité.

Je ne reviens pas sur les exemples d'exercice effectif de la souveraineté post-coloniale — des exemples parmi d'autres — que j'ai cités lors de ma première plaidoirie, y compris après 1966 contrairement à ce qu'affirme le professeur Cahier (CR 93/28, p. 65). Mais je tenais simplement à en préciser la portée pour mettre fin à un "climat" que la Libye souhaite imposer.

Le professeur Cassese a largement évoqué hier, et de nouveau aujourd'hui, les principes juridiques qui s'attachent aux effectivités ainsi que la jurisprudence concernant les zones désertiques ou peu peuplées. Ces principes et cette jurisprudence restent, bien sûr, valables pour la période post-coloniale.

D'autre part, à plusieurs reprises et dans différentes plaidoiries, la Partie adverse a porté des accusations graves contre l'administration par le Tchad du BET après l'indépendance de cet Etat.

Pour résumer ces propos, je dirais que la Libye considère que, dans la période immédiatement postérieure à l'indépendance du tchad, cet Etat n'était qu'une "marionnette" de la France en Afrique.

Ceci est inacceptable.

Ainsi, le professeur cahier précise : "Les Français sont toujours présents dans la région" (CR 93/28, p. 59) ou encore : "La France, présente jusqu'en 1960, disparaît formellement mais non en substance, jusqu'en 1965." (*Ibid.*, p. 64.)

Le lendemain, le professeur Bowett accentuera cette impression en affirmant, par exemple, que le contrôle du Tchad reste aux mains de la France, ou que les Français en poste au Tchad reçoivent leurs instructions de Paris (CR 93/29, p. 54).

Il s'agit là d'affirmations graves et gratuites.

— Graves parce qu'au-delà du cas spécifique du Tchad, la Libye remet en cause les relations entre les Etats nouvellement indépendants et leurs anciennes puissances coloniales. Or, ces relations sont très répandues et logiques dans le cadre d'une succession que l'on souhaite paisible.

Mais, surtout, "gratuite" — ou sans fondements — car aucune référence ne vient étayer ces affirmations. On aurait souhaité en savoir plus...

C'est bien le caractère souverain du Tchad qui est remis en cause, alors que l'assistance apportée par la france au Tchad résulte d'accords en bonne et due forme signés par les deux Etats.

Ces accords des 11, 13 et 15 août 1960 (mémoire de la Libye, vol. II, annexe 31) sont — somme toute — classiques. Ils prévoient une assistance multiforme dans des domaines divers mais n'annihilent en aucun cas la souveraineté de l'Etat en cause.

Ainsi, à titre d'exemple, l'article 3 de l'accord de défense précise que les républiques concernées (il s'agit du congo, de la République centrafricaine et du Tchad) sont "responsables de leur défense intérieure et extérieure" et qu'à cette fin, "chacune de ces républiques dispose de forces armées nationales" (*ibid.*, annexe 31).

Est-ce cette situation qui fait si peur à la Libye puisque le professeur cahier en déduit : "tant que les Français sont là, la Libye se tait" (CR 93/28, p. 65) ?

Il n'est jamais venu à l'esprit du tchad de considérer la Libye comme un Etat dominé par une ancienne puissance coloniale.

Pourtant, le 29 juillet 1953, la Libye indépendante signait avec le Royaume-Uni de

Grande-Bretagne et d'Irlande du Nord un accord qui ressemble étrangement aux accords franco-tchadiens (mémoire de la Libye, vol. II, annexe 27).

Cet accord prévoit notamment une assistance en cas de conflit armé ou de guerre (art. 2) ainsi qu'une assistance financière à la Libye en échange des facilités octroyées pour le stationnement des troupes britanniques dans ce pays (art. 3).

La Libye a tout simplement signé un accord avec un Etat qui pouvait, à l'époque, garantir sa défense. Le Tchad n'a pas agi autrement.

Finalement, remplacer le Tchad souverain par la France permet un tour de "passe-passe" qui peut paraître subtil, mais qui aboutit à une accusation sans fondements et je dirais "sans avenir", puisqu'il est impossible d'en déduire une incidence juridique.

Cela n'altère en rien les effectivités bien réelles du tchad dans la région objet du litige. Aborder la question de cette manière correspond bien à un constat d'échec de nos honorables contradicteurs.

Ces précisions sur les effectivités me conduisent à d'autres précisions sur les relations bilatérales entre le Tchad et la Libye durant les années soixante-dix. En effet, selon le même procédé, la Partie adverse cherche à neutraliser en sa faveur une période délicate.

II. LES RELATIONS BILATERALES ENTRE LES DEUX ETATS DE 1973 A 1977

Je ne souhaite pas, Monsieur le Président, revenir sur l'ensemble des relations bilatérales postérieures à l'indépendance du tchad.

Mais il est des contre-vérités qui sont tenaces, et malgré les relations conventionnelles évoquées par moi-même et les relations bilatérales évoquées par le professeur Higgins lors du premier tour de plaidoiries, nos honorables contradicteurs, par la voix du professeur Cahier, se sont de nouveau employés à semer le doute.

Selon la technique du "puzzle" décrite par le professeur Pellet (CR 93/26, p. 58-59), il s'agit pour la Partie adverse d'isoler dans la chronologie certaines périodes pour accréditer l'idée d'une discontinuité dans l'attitude tchadienne.

Déduction faite des périodes où la protestation du tchad contre l'occupation de la bande d'Aozou est reconnue par la Libye, il resterait quelques années que la Libye voudrait présenter comme "incertaines" où le Tchad aurait montré les signes d'un acquiescement à cette occupation. Il s'agit précisément de la période allant de 1973 à 1977.

Le professeur Cahier affirme en effet à propos de cette période : "Il aura fallu quatre ans au Tchad pour réaliser qu'il a fait l'objet d'une agression et que la Libye se trouvait illégalement à Aozou." (Cr 93/28, p. 71-72.)

Reprenons brièvement, Monsieur le Président, le cours de ces quelques années, pour montrer que le Tchad n'a pas renoncé à protester.

— 1973 est l'année où la Libye occupe la bande d'Aozou. Il s'agit plus d'infiltrations discrètes mais persistantes que d'une occupation brutale. La réalité de l'occupation n'en demeure pas moins.

Certes, le Tchad ne réagit pas immédiatement mais ceci s'explique par des raisons très simples. La région échappe, depuis plusieurs années déjà, au pouvoir central et les communications étant peu développées au Tchad, le temps de réaction est nécessairement plus long. Les distances sont immenses, la poste ou le téléphone n'existent pas dans le nord du pays, et la plupart des informations résultent tout simplement du passage des caravanes.

Néanmoins, dès 1973, les commissions techniques créées à la suite du traité de 1972 échouent, et le blocage est provoqué par les protestations tchadiennes contre cette occupation, comme l'a montré le professeur Higgins (CR 93/26, p. 15).

C'est aussi à la fin de cette année — en novembre et décembre — que les rapports mensuels du préfet du BET rendent compte de la présence de Libyens dans la bande d'Aozou; on y signale même qu'un drapeau libyen est planté au poste d'Aozou (témoignage de M. Yakouma déposé auprès du Greffe de la Cour le 9 février 1993).

— 1974. En 1974, outre la tentative de "zone de coopération" (CR 93/26, p. 16), c'est l'année où une mission conduite par MM. Bohiadi et Yakouma se rend à Tripoli pour demander à la Libye les raisons de son occupation de la bande d'Aozou. La réponse est évasive.

Selon la Libye, il ne s'agit aucunement de s'installer et ces incursions auraient seulement un

but "humanitaire". Enfin, le drapeau sur le poste d'Aozou serait une "erreur" (témoignage de M. Yakouma précité).

Bref, la Libye aurait été, en quelque sorte, un précurseur du devoir d'ingérence !

Cette justification purement circonstancielle va bien vite disparaître au profit des vraies raisons de l'occupation.

— 1975 est une année où l'on ne trouve pas trace, dans le dossier, de protestation formelle contre l'occupation libyenne. La raison, une fois de plus, en est simple. Les troubles au Tchad aboutissent au renversement du président Tombalbaye qui est remplacé par un conseil supérieur militaire avec à sa tête le général Malloum.

Mais celui-ci va immédiatement reprendre les protestations contre la Libye à propos de la bande d'Aozou comme ceci sera confirmé les deux années suivantes.

1976. En effet, dès 1976, une mission tchadienne se rend de nouveau à Tripoli le 29 juillet. Le but de cette rencontre est de protester contre l'occupation de la bande d'Aozou. La seule réponse de la Libye — et ceci sera d'ailleurs une constante durant cette période — est l'invocation de la convention Laval-Mussolini de janvier 1935 (mémoire du tchad, annexe 283).

Dès lors, les négociations sont dans l'impasse mais l'on décide néanmoins de la création d'une commission mixte technique chargée de se pencher sur la question.

Cette même année, lors d'une brève escale du colonel Kadhafi le 20 octobre à N'Djamena, le président Malloum lui rappelle qu'aucune coopération entre les deux Etats n'est envisageable tant que la bande d'Aozou est occupée (Keesing's Contemporary Archives 1977, p. 28.136; contre-mémoire du tchad, annexe 124).

— 1977. Enfin, l'année 1977 est réellement le révélateur et l'aboutissement de toutes les démarches entreprises auparavant.

La commission mixte technique prévue en 1976 se réunit pour la première fois à N'Djamena du 23 au 26 juin 1977.

Il résultera de cette réunion un procès-verbal *approuvé* et *signé* par les deux délégations. Or, on ne peut qu'être frappé par l'incohérence de la Libye qui — je le répète, Monsieur le Président —

a approuvé ce procès-verbal.

Il convient de s'arrêter rapidement sur celui-ci.

En effet, la Libye estime qu'il n'existe pas de différend entre les deux Etats et que : "les limites de la Jamahiriya sont conformes aux accords internationaux, notamment l'accord Laval-Mussolini de 1935 *qui a été bel et bien ratifié par la France et l'Italie*" (les italiques sont de nous).

La Partie adverse a souvent invoqué son dénuement et son faible nombre de juristes. A la suite de cette lecture, nous pourrions accorder à cet argument un certain crédit. Seulement, nous ne sommes plus en 1951, ni même en 1960, mais bien en 1977. Cette erreur est alors difficilement compréhensible.

En réponse, le Tchad indique que les conventions citées dans l'accord du 10 août 1955 — qui lui est bien en vigueur — sont le fondement du tracé de la frontière entre les deux Etats.

La Libye, toujours d'après ce procès-verbal, affirme que l'accord du 12 août 1974 qui "actualise" les frontières ne tient pas compte des frontières coloniales. Ceci est, bien sûr, faux. Le professeur Cahier le confirme d'ailleurs en précisant : "Au point de vue de la détermination ou de l'indétermination de la frontière, le traité de 1974 n'ajoute rien." (CR 93/28, p. 61.)

Nous l'avons vu, en réalité, ce traité signifie simplement qu'il existe une frontière.

Pour conclure cette réunion houleuse qui méritait d'être relatée, la Libye affirme qu'il n'existe pas de problèmes frontaliers puisque ce pays "se trouve dans ses propres limites frontalières".

Voilà au moins un aveu, il existe une frontière !

Faisant état ultérieurement de l'échec de cette réunion, la Libye estimera même qu'il ne s'agit que d'un "problème technique dans la délimitation de la frontière" (réplique du tchad, annexe 163).

Vous me l'accorderez, Monsieur le Président, il est difficile dans ce labyrinthe de justifications de connaître la véritable position de la Libye.

A partir de cet instant et prenant acte de l'impossibilité de négocier bilatéralement avec la Libye, le Tchad portera l'affaire devant les instances internationales comme l'expliquera le professeur Franck après moi.

Mais quelques conclusions simples se dégagent de cette courte analyse.

1) Contrairement à ce qu'affirme la Libye, les protestations du Tchad sont bien réelles et ininterrompues.

D'ailleurs, le Tchad résumera, à chaque fois, devant l'OUA et l'ONU la chronologie de cette démarche (Assemblée générale, 32e session, 23e séance plénière du vendredi 7 octobre 1977, Rapport de la réunion du comité de médiation Tchad/Libye à Libreville du 11 août 1977, réplique du Tchad, annexe 163).

A moins que nos honorables contradicteurs n'estiment qu'une protestation "quotidienne" est nécessaire, l'enchaînement des protestations tchadiennes est tout à fait probante.

2) Le Tchad a suivi un ordre logique dans cette démarche. Les négociations bilatérales ont précédé la saisine des organes multilatéraux. Cette saisine suivant immédiatement l'échec de ces négociations.

Cet ordre est conforme aux moyens du règlement pacifique des différends énumérés par l'article 33, paragraphe 1, de la Charte des Nations Unies.

3) Enfin, cette période montre s'il en était besoin la variété des positions de la Libye.

— En effet, chronologiquement, la Libye estime, tout d'abord, qu'il n'y a pas de différend ... puis reconnaît qu'il existe un différend frontalier.

— Ensuite, elle invoque le traité de 1935 ... alors qu'elle reconnaît aujourd'hui qu'il n'est jamais entré en vigueur.

— Finalement, elle accepterait la base du traité de 1955 ... mais "actualisée" — selon l'expression alors utilisée — par l'accord de 1974 alors que ce texte ne porte aucune mention d'une quelconque actualisation. La Libye le reconnaît aujourd'hui également.

— Dans un sursaut, la Libye admettra en 1977 qu'il ne s'agit que d'un "problème technique de délimitation frontalière".

— Enfin, aujourd'hui — comme vous le savez, Monsieur le Président, Messieurs les juges, il n'y aurait — selon les conclusions de cet Etat — aucune frontière et la ligne revendiquée ferait basculer plus de la moitié du Tchad en territoire libyen.

Il est effectivement temps, Monsieur le Président, que votre Cour mette fin à cette situation

incohérence dont le Tchad souffre depuis plus de vingt ans.

Je vous remercie, Monsieur le Président, Messieurs les juges, de votre attention et vous demande de bien vouloir redonner la parole au professeur Franck.

The PRESIDENT : Thank you very much, Professor Sorel. Professor Franck.

Mr. FRANCK: Thank you, Mr. President.

THE DISPUTE OVER THE "AOZOU STRIP" BEFORE THE UNITED NATIONS AND THE OAU

1. It is commonly accepted by both Libya and Chad that Libya took possession of the Aozou strip for the first time in 1973. Obviously, Libya thereby crossed the frontier line defined by the 1955 Treaty.

2. What happened thereafter at the United Nations and at the OAU? Chad, consistently, persistently, insisted that the frontier line established by the 1955 Treaty had to be respected by Libya and, if necessary, enforced by the United Nations and by the OAU. Thus the post-1973 United Nations and OAU activities are relevant, of course, to demonstrate Chad's unswerving belief in the terms and the efficiency of Article 3 and Annex I of the 1955 Treaty with Libya. This will scarcely amaze anyone.

3. But what did Libya believe in this new period? Libya now argues publicly, during this period, on the record, and pretty much throughout the period, that the instrument determining its boundary with Chad was the 1935 Treaty of Rome which, it said, was endorsed by the United Nations "phantom map". And, occasionally, it claimed historic title *to the area that it had occupied*, and claimed that it was there by way of Ottoman inheritance (in the UN: see UN Doc. No. S/PV.2419, 23 March 1983, pp. 23/25-26; in the OAU: see MC, Livre IV, Ann. 293, p. 2). But to this area, to the Aozou, to the lands between the 1955 and the 1935 lines.

4. And, finally, what happened in the global and regional organs is relevant to this case because it casts light on what the international and regional communities of States thought the dispute was about, and what they thought about the relative merits of the claims of Chad — based

on the 1955 Treaty and its incorporated instruments of reference — as compared with the claim Libya then was advancing, based mainly on the Laval-Mussolini Treaty of 1935 and, very occasionally, on vague references to Italian and Ottoman claims which it thought confirmed that line (in the UN: see UN Doc. No. S/PV.2419, 23 March 1983, pp. 23/25-26; in the OAU: see MC, Livre IV, Ann. 293, p. 2).

5. The first thing to note is that *nowhere* in this record of events, of events occurring in the authorized multilateral fora for dispute settlement, nowhere did Libya *ever* assert the absence of a southern frontier. On the contrary. It insisted on a boundary: one that accorded with the unratified Treaty of Rome, one that accorded with its conquest of Aozou and, of course, one that accorded with the "phantom map". I could easily exhaust my allotted time before the Bar merely by citing the instances. Let me give one example and merely offer the rest as citations in the written version. In 1983, Libya's representative to the Security Council asserted that Aozou had never been part of Chad. This he demonstrated by referring to the 1950 United Nations Commissioner's map. He implied that Libya and Chad had no border delimitation problem. "Libya signed the Cairo Agreement" — he means the 1964 Cairo Declaration — "and has respected the colonial borders", he declared. "We inherited borders from Italian colonialism, and Chad inherited borders from French colonialism." Borders, *Mr.* President. He did not say we inherited claims. He did not say, "I wonder where the border is?" (UN Doc. No. S/PV/.2419, 24 March 1983, p. 27; see also pp. 22-26; for additional Libyan reliance on the "phantom map" and the 1935 Treaty, see MC, at pp. 301-302 (E), pp. 324-325 (Fr), paras. 129-130 and cites therein; MC, at pp. 310-311 (E), pp. 333-334 (Fr), paras. 160-161 and cites therein; MC, Livre IV, Ann. 292, p. 2; Ann. 292, pp. 1, 3-4; MC, Livre VI, Ann. P82, pp. 373-374, 389, 394; MC, Livre IV, Ann. 283, p. 3; Ann. 284, pp. 4-5). Permit me to repeat: nowhere do we hear a word about the non-existence of a frontier. We hear "Aozou", we hear "Secretariat map".

6. Of course, Chad, too, insisted that there was a frontier, the frontier described by the 1955 Treaty and its annexed instruments, and it protested Libya's violation of that line. Chad complained to the United Nations General Assembly as early as 1971 that Libya harboured expansionist aims; it

had not actually arrived yet. Thereafter it protested vociferously against Libya's invasion: at first to Libya, as we have seen from Professor Sorel, then to the General Assembly in 1977, 1978, 1982, 1983, 1984, 1985, 1986 and 1987, and to the Security Council in 1978, 1983, 1985 and 1986. It stated that Libyan forces had crossed the 1955 line, that the invaders were still there, and that they ought to be required to withdraw back behind that frontier (MC, pp. 323-340, paras. 124-184, and cites therein).

7. Chad similarly made this same complaint to the OAU in 1977, and kept it before that organization for the next 11 years, until the matter was at last referred to this honourable Court (see CMC, paras. 2.23-2.47; see also Livre IV, Ann. 285; Ann. 286; Ann. 287; Ann. 288; Ann. 289; Ann. 290; Ann. 291; Ann. 292; Ann. 293. MC, Livre VI, Ann. P81; Ann. P82).

8. Libya has accused Chad of failing to pursue its complaint before the United Nations between 1973 and 1977. But, as my colleague Professor Sorel has demonstrated, this was not a period of hearts and flowers. Chad had not yet given up hope of settling its problem with Libya bilaterally. Even then, however, in its bilateral discussions with Chad, Libya already was beginning to invoke the 1935 Treaty to justify itself and to deflect Chad's entreaties. When, in 1977, bilateral efforts had clearly failed, Chad went directly to the United Nations and then to the OAU, voicing its very precisely formulated complaint based on the evident violation of its 1955 Treaty rights.

9. From the printed record, we know what Chad said before the United Nations and the OAU. It accords perfectly with what Chad now says in the written and oral pleadings of this case. I should not say so, but Chad scarcely needed its lawyers: it got its case exactly right, back in 1978, before the Security Council.

10. What did Libya say? Well many different things. At first, in 1971, it specifically disavowed any designs on any part of the Aozou strip when Chad raised the question of that road map (MC, pp. 300-301 (E), pp. 323-324 (Fr.), paras. 124-127). Although the map exactly showed the Aozou strip as Libyan territory, divided from Chad by a fixed frontier, the Libyan delegate to the United Nations said that this was "a tourist map", made in Italy, which had no significance, and thus "in no way determines the borders between our countries" (MC, at p. 301 (E), p. 324 (Fr.),

para. 126). Somewhat reassured by this, preoccupied by civil war, the Government of Chad tried conciliation, negotiation and appeasement. But it certainly did not, thereby, cease to press Tripoli for recognition of Chad's title to Aozou as my colleague, Professor Sorel, had indicated.

11. Well, then, four years later Chad despaired of the bilateral approach and turned to the multilateral fora. What did Libya say then? In February 1978, Libya's Ambassador to the Security Council said "The representative of Chad accused us of having occupied Aozou in 1973, but this is not true, we did not occupy anything." (MC, p. 306 (E), p. 329 (Fr.), para. 145.) My friend and colleague Professor Cahier has responded to our quoting this statement by quoting, in turn, the Libyan representative as having added: "Aozou, comme n'importe quelle autre partie de la Libye, se trouve sous administration libyenne." (CR 93/18, p. 45.) Well that would at least have been a clearcut admission that the invasion had taken place, as, of course, it had. But Libya was still tempted to play coy. Even in 1978, Libya had not yet quite made up its mind to admit having seized the area. Indeed, he made its representative made it sound as if, should there be a problem, it must be one of demarcation: "Mais tout le monde peut avoir des problèmes de frontières, surtout dans les régions aussi peu peuplées." (*Ibid.*, para. 67.) No problem.

12. At the 1978 General Assembly session, responding to Chad's very detailed legal indictment, Libya's representative still insisted that Chad's complaints were absurd: we do not collect deserts (GAOR, Plenary, 34th Meeting, 13 October 1978, paras. 28-46). Increasingly, however, Libya also began to tell the United Nations and the OAU that the dispute was none of their business. For example, Mr. Treiki, representing Libya, told the Security Council in 1983:

> "I do not intend to dwell on legal questions . . . I do not believe that the Security Council, which deals with international peace and security, concerns itself with the convention of 1936 and of 1956." (MC, p. 310 (E), p. 333 (Fr.), para. 160.)

"1936", "1956"? This outburst is interesting because it shows (1) Libya's attitude towards the Security Council, and (2) Libya's belief that the dispute turned on the applicability of two treaties: the Rome Accord of 1935 and the Franco-Libyan Accord of 1955. Although Mr. Treiki may have not been particularly good at remembering dates, Libya was now staking out a cognizable claim.

13. In subsequent discussions in the United Nations and the OAU Libya no longer denied the

obvious. Instead, reluctantly, it stated its claim: to *Aozou*. Not a claim to the 15th parallel, and certainly not a claim that the border was undelimited. On the contrary, again and again Libya showed the "phantom map" as evidence of title, title to Aozou, title up to the 1935 line. Libya relied on 1935, Chad on 1955. And so their dispute was about two lines, and the area between the lines of course; about an area with a fixed border. Indeed, it was about two fixed borders: Libya says over and again, on the record "Aozou is an integral part of Libya". And the Ambassador, in 1983, in stating this continued to prove it by referring the members to the Secretariat map (MC, at p. 311 (E), p. 334 (Fr.), para. 161). In 1984, the Libyan reply to Chad in the Assembly was that "Aozou is Libyan territory and will remain so forever" (MC, at p. 301 (E), p. 337 (Fr.), para. 171). Chad and Libya may not have agreed on much, after 1973, but until 1991 they certainly agreed on this much: the dispute was over the Aozou strip. And the dispute turned mainly on whether the applicable treaty of reference was that of 1955 or that of 1935.

14. What did the other States in the United Nations think about the matter? In 1983, eight African States of the region asked to be heard at the Security Council, all of them in support of Chad's position. None came to the defence of Libya's view (MC, at pp. 311-313 (E), pp. 335-337 (Fr.), paras. 164-65; see also: SCOR, 38th Year, 2428th Meeting (S?PV.2428), 31 March 1988, pp. 32-36 and 46-48).

15. What did the OAU make of all this? For an answer we must look to two different OAU efforts, although they were connected. One was the effort begun in 1977 specifically to resolve the dispute between Libya and Chad. The other, which my colleague Professor Higgins has addressed in the first round of oral pleadings, is the broader OAU effort to create a legal and institutional framework for containing and managing disputes, like the Libya-Chad dispute, but in general.

16. In 1977, Chad took its dispute with Libya to the OAU. Since the OAU was trying to act as mediator, it of course kept its opinions of the parties' rights to a minimum while trying its best to understand each side's claim. It did repeatedly express its frustrations at Libya's failure to co-operate with its Commission of Mediation, its failure even to present a claim (MC, Livre VI, Annexe P81, pp. 279, 298, 343-346; Annexe P82, p. 391; CMC, Annexe CM/T 137, p. 838; see

also CMC, para. 9.122, and cites therein). And it expressed outrage at Libya's attempt, in 1981, to annex Chad, to effect a federation while Libyan troops were still in N'Djamena, supposedly "on invitation" as a "peace force" (MC, p. 331 (e), para. 154, and cites therein).

17. What the OAU did, and very effectively, is to analyse the legal issues underlying the dispute. What did the OAU Sub-Committee think the dispute was about? Its 1987 Report states:

> "In particular, the object of the dispute is the status of the Aozou strip, insofar as it results from the relevant international accords. In other words, the dispute is about the location of the northern frontier of Chad and the southern one of Libya." (MC, Livre VI, Ann. P81, p. 303.)

Moreover, it continued:

> "This is a matter of a conventional frontier." (*Ibid.*)

And:

> "This is about a delimitation which has not yet been followed by a demarcation." (*Ibid.*, p. 304.)

And:

> "This is about a frontier to which the principle of the intangibility [of frontiers] applies as consecrated by African international law (the Charter and relevant Resolutions of the OAU)." (*Ibid.*)

That's what they thought. The OAU Sub-Committee's 1988 Report summarizes Libya's position as the OAU understood it. Libya, the OAU Sub-Committee's legal and cartographic experts say, argues that the treaties of 1898, 1899 and 1919 are not opposable to it. Why not? Among other reasons, because these were "abandoned by France, when, for the first time, a frontier was delimited by the negotiation of the Treaty of Rome in 1935". This is not the OAU's view, this is the OAU's understanding of what Libya was arguing in 1988. And, I quote the OAU once more, again the OAU's understanding of Libya's view, "the validity of this frontier results from the validity of the Treaty of Rome of 7 January 1935" (MC, Livre VI, Annexe P82, pp. 388-389). That's what the OAU thought Libya was saying.

18. Professor Bowett, using Libya's magic lanterns, projected the OAU Legal and

Cartographic Sub-Committee's summary of Libya's case as understood by that body (CR 93/29, pp. 57-58). He then went on to consider briefly the OAU Sub-Committee's next and final report of 1988, which I have just been quoting to you at somewhat greater length. I take the liberty of borrowing Professor Bowett's prose, on which I could not aspire to improve:

> "the Sub-Committee again reviewed the elements of Libya's position, as revealed by the Libyan documentation. And, clearly, Libya now appeared to be assuming that the . . . Franco-Italian Treaty was valid. Now this was an error . . ." (CR 93/29, p. 58.)

This is a quotation from Professor Bowett.

19. Some error. The error had been Libya's basis for twenty years of occupation of the Aozou strip. After twenty years of occupation, of war, of mayhem, all justified in the name of enforcing the 1935 line, we come to a sentence: "Now this was an error." Chad can scarcely believe its ears. Chad will try, however, to be a gracious in accepting this concession as Libya's counsel was in making it.

20. But this is not an Oxford Union Debate. If "this was an error" would it not follow that the actions taken in express reliance on the "error" might now graciously be corrected? We trust that, with the Court's guidance, that is precisely what will happen. We anticipate that Professor Bowett's handsome concession that the 1935 agreement cannot legitimate Libya's occupation of the Aozou will be matched by an equally handsome return of the territory seized "in error".

21. Permit me now to turn from the particular to the general. While the OAU Commission and its Sub-Committee were trying to sort out the legal issues in our dispute, and did so extremely well if I may say so, despite the total non-co-operation of Libya, the African Heads of State were also concerning themselves with the issue indirectly. By this I mean they were aware of the sort of problem existing between Chad and Libya. They knew that, potentially, this sort of dispute could engulf the continent. And, wisely, they were determined to head it off.

22. How could this be done? In the meeting of African Heads of State, from 17 to 21 July 1964, they pondered this crucial issue, debated it, and came to a conclusion, which is now celebrated as the Cairo Declaration. It is not a treaty. It is a political declaration. Yet it captures

the intent of Africa's Governments. And it has saved Africa from the kind of chaos we have witnessed elsewhere, places where the horsemen of the apocalypse had also ridden and also been discounted. In the 1986 *Frontier Dispute* case, the ICJ Chamber gave the Cairo Declaration appropriate recognition in the larger context of the legal doctrine of *uti possidetis* (*I.C.J. Reports 1986*, p. 566).

23. In their 1964 Declaration, the Heads solemnly declared "that all Members States pledge themselves to respect the borders existing on their achievement of national independence". What does this mean? I think I know, and, Mr. President, I know that you know, and, surely, everyone at Cairo knew. The Chamber in the 1986 *Frontier Dispute* case understood what it meant. It mean a "freezing" of frontiers as they were at independence, as they appeared in the "photograph" taken at the critical moment.

24. But suppose an African Government did not *like* what the Declaration meant, because it tended to bar an unsatisfactory boundary claim that that Government had been nursing. What would such a government do? Well, Somalia and Morocco, who were in prescisely that position, voted against the resolution.

25. Professor Cahier told us, on 7 July, that Morocco and Somalia were not the only States in Africa with a boundary problem. He rightly pointed out that some other States, ones which did not vote against the resolution, may yet also have harboured unrequited territorial ambitions and cannot be said to have relinquished them merely by their vote in favour of the resolution (CR 93/28, p. 66). He cites the case of Burkina Faso and Mali, which voted "yes" just like Libya. But, as it happens, the Foreign Minister of Burkina Faso (then still Upper Volta), unlike Libya, spoke at length at Cairo about the effect of the Declaration on his country's boundary dispute with a neighbouring country. (Addresses delivered at the Assembly (Assembly of the Heads of State and Government of the OAU, Press Center, Information Department, Cairo, 17-21 July 1964, pp. 217-18). H.E.M. Lompolo Kone.) He noted that his country "has in its relations with a sister country had to face a new and nonetheless insidious form of territorial encroachment . . ." But he still recognized that the "principle of respect for borders finds its justification not in any reasoning of colonial fate, but in an African

decision on the level of its highest aspirations" (*idem*, p. 217).

26. Well, Professor Cahier, that is another way of doing it. Burkina Faso voted and spoke for the resolution, unlike Somalia and Morocco, but also gave notice that it had a boundary grievance, which it would seek to resolve, resolve within the framework of the Declaration. Professor Cahier is correct, of course, in stating that a vote for the Cairo Declaration does not bind Libya any more than it bound Burkina Faso, never to pursue the claim, certainly not before this Court (CR 93/28, p. 66). We fully agree. What Chad has been saying is something different, and it has two prongs.

(1) States which, in 1964, had boundary disputes tended, one way or another, to put them forward at the time of the debate on the Cairo Declaration. Libya did not. This is an evidentiary point about Libya's state of mind in 1964. We plead it to rebut the notion that, since 1951, despite the 1955 Treaty, Libya continually believed itself to be entitled to large parts of territory administered at that time by Chad.

(2) The Cairo Declaration was more than an opportunity for an exchange of views and a ventilation of aspirations. It was part of a process by which the new law of decolonization was taking shape.

Professor Cahier is too kind. Professor Franck, he said on 7 July, "nous a donné une excellente leçon universitaire sur la valur du principe de l'*uti possidetis* et sur celui du respect de l'intégrité territoriale des Etats . . ." Je vous remercie, cher collègue. But do I detect a note of sarcasm about my "leçon universitaire"? And why would that be? Professor Cahier, an extraordinarily distinguished academic lawyer, surely does not scorn the university. But I think I understand the edge in his tone. He is faithfully reflecting the feelings of his client. Yes, to Libya, *uti possidetis* is a nice little idea which belongs in a university seminar, not in the real life of real nations.

27. But *uti possidetis juris*, Mr. President, like the Cairo Declaration, is not a mere empty symbol, inapplicable to real life. It would indeed be that, if Libya succeeded in deconstructing it into a principle that only applies when it is not needed: that is, only to *uncontested* boundaries. That is Libya's view: it is a nice principle, but does not apply here because Libya does not recognize any

boundary. Libya, in effect, invokes that formula which inspired one of Immanuel Kant's most eloquent fulminations, his essay: "On the proposition 'While this may be so in theory, yet it does not apply in practice'". Libya thinks that while in theory the principle guarantees the stability of frontiers, in practice it guarantees nothing, or, rather, it only guarantees uncontested frontiers. When a frontier is contested, Libya believes, *uti possidetis* is inapplicable because it is a principle of law and the issue then is not one of law, but one of *fact*: where is the frontier?

28. Mr. President, if the Court accepts that line of reasoning, the legal principle of *uti possidetis* would, indeed, have been deconstructed, leaving nothing behind but questions of disputed, or disputable fact. But the legal principle of *uti possidetis* is not a hollow word-formula, to be deconstructed away. It is a principle alive with purpose, with policy intent, put there by responsible world leaders for excellent reasons. As the Chamber said in the 1986 *Frontier Dispute* case,

> "the maintenance of the territorial status quo in Africa is often seen as the wisest course . . . The essential requirement of stability . . .has induced African States judiciously to consent to the respecting of colonial frontiers . . ." (*I.C.J. Reports 1986*, p. 567.)

29. The principle of *uti possidetis* puts the law squarely on the side of boundaries, the stability of frontiers, even contested ones. It is a presumption in favour of permanence, in favour of stability. In the context of this dispute, to repeat the formula used by the Chamber in the 1986 *Frontier Dispute* decision, it opts for "the maintenance of the territorial status quo in Africa . . ." (*ibid.*).

30. Now, Mr. President, honourable Judges, *uti possidetis juris* does not say: stability at all costs. However, it *is* an invitation not to find the absence of a boundary where, for 40 years both Parties proclaimed their belief that a treaty-defined boundary did exist. It asks the Court to resist blandishments to engage in creative cartography. It is an invitation to choose stability where a stable frontier line is ascertainable. And a line is certainly ascertainable at the Libyan-Chadian border: the line designated in 1955 and respected until 1973: If *uti possidetis juris* cannot be applied to this boundary, where can it applied?

Mr. President, distinguished Judges, I thank you for your attention.

The PRESIDENT: Thank you very much, Professor Franck. We will resume at 10 O'clock tomorrow morning.

The Court rose at 1 p.m.

CR 93/32

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1993

Public sitting

held on Wednesday 14 July 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 14 juillet 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial (Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh

Judges *ad hoc* Sette-Camara
Abi-Saab

Registrar Valencia-Ospina

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whewell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Geneva,

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramadane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général ographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susal Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

The PRESIDENT: Please be seated. I give the floor to Professor Pellet.

M. PELLET : Merci, Monsieur le Président. Monsieur le Président, Messieurs de la Cour.

1. Ma brève plaidoirie de ce matin introduit la quatrième et dernière partie de la duplique orale du Tchad.

Cette partie portera sur le traité franco-libyen du 10 août 1955 qui nous paraît de nature à fournir des bases suffisantes, simples, et j'allais presque dire "évidentes", à la solution du différend que vous êtes appelés à trancher en vertu de l'accord-cadre conclu à Alger le 31 août 1989.

L'un des paradoxes de l'affaire dont vous êtes saisis est cependant qu'après 2344 pages d'écritures — nous avons compté, Monsieur le Président ! — sans y inclure bien sûr les vingt et un volumes d'annexes, et après un mois de plaidoiries orales, les Parties continuent à s'opposer sur la véritable nature et sur la portée réelle de leur différend.

Il n'y a aucun doute : les Parties sont en désaccord. Mais sur quoi ?

2. Comme l'ont montré hier mes collègues et amis, les professeurs Franck et Sorel, le Tchad, a, depuis vingt ans que dure le différend, eu une attitude claire, constante et ferme. Ce pays pauvre, défavorisé, miné par la guerre civile et trop de luttes fratricides, n'a jamais varié dans ses convictions juridiques, et je dirais même "patriotique". Pour tous les gouvernements qui se sont succédé à N'Djamena depuis 1971, année des premières menaces sur l'intégrité du territoire, l'affaire de la bande d'Aouzou — car c'est de cela qu'il s'est toujours agi — a constamment appelé les mêmes réactions : cette région de 114 000 kilomètres carrés fait partie intégrante de la République du Tchad, et ceci pour des raisons qui n'ont pas varié : le traité conclu le 10 août 1955 entre la Libye indépendante et la France, dont le Tchad a hérité, a fixé, *ne varietur*, la frontière entre les deux pays; celui du 7 janvier 1935, le traité Laval-Mussolini, n'est pas entré en vigueur et n'a produit aucun effet juridique.

3. Monsieur le Président, il est plus difficile de s'y retrouver dans les positions successives qu'a prises la Libye, quoique, durant les vingt premières années qui ont suivi son accession à l'indépendance, elle ait manifesté, par son attitude constante, sa conviction que le tracé de sa

frontière méridionale était bien celui que le Tchad défend aujourd'hui et qu'avait défini le traité de 1955. Ceci s'est traduit par une coexistence paisible, avec la France d'abord, puis avec le Tchad indépendant jusqu'à la fin des années soixante. Et ceci n'est pas dépourvu de signification juridique.

Les choses deviennent moins claires par la suite : la Libye fait ou laisse circuler des cartes douteuses; mais elle s'en désolidarise; elle s'empare de la bande d'Aouzou mais, dans un premier temps, elle affirme n'y être présente qu'à titre purement humanitaire avant de nier qu'il y eût un différend, puis de se justifier du bout des lèvres mais par des arguments qui, directement ou indirectement — je pense à l'invocation de la "carte fantôme" dont a beaucoup parlé le professeur Franck —, reviennent toujours à invoquer le traité Laval-Mussolini de 1935.

Pourtant, la Libye a porté devant la Cour un autre différend, défini par elle seule comme portant sur la moitié du Tchad. Au demeurant, nous avons cru déceler, à la fin surtout des plaidoiries de la Libye, comme un mouvement de retraite sur la ligne de 1935. Du reste, dans le magazine *Jeune Afrique* du 8 juillet dernier, chacun a pu lire une interview du ministre des affaires étrangères de la Libye, M. Al-Mountasser, dans lequel celui-ci déclarait : "Quant au différend sur la bande d'Aouzou, nous attendons le verdict de la Cour de La Haye."

Cette déclaration, Monsieur le Président, accroît notre perplexité; car, le jour même où le chef de la diplomatie libyenne faisait cette déclaration, M. l'agent de la Libye maintenait les conclusions de la Jamahiriya à cette place (cf. CR 93/29, p. 71-72). Les problèmes juridiques sur lesquels le professeur Higgins avait attiré l'attention de la Cour au début de nos plaidoiries (cf. CR 93/21, p. 44 et suiv.) sont donc loin d'être résolus; nous sommes convaincus que votre arrêt y pourvoira.

4. Le contraste entre ce que j'appellerai l'"ampleur" des revendications de la Libye — mais c'est une litote — et sa stratégie de plaidoirie est très frappant.

La Partie libyenne n'a en effet jamais essayé d'établir positivement le bien-fondé de ses prétentions aussi inattendues qu'énormes. Elle s'est employée, bien plutôt, à critiquer les arguments juridiques avancés par le Tchad. Mais l'addition de raisonnements exclusivement négatifs ne nous emble pas d'être d'une grande aide pour permettre à la Cour de régler le litige. "Moins plus moins" n'a jamais permis de dégager des solutions positives et la stratégie négative adoptée par la Libye

a peut-être pu faire naître un doute sur tel ou tel élément de la thèse que nous avons soutenue; elle ne nous paraît pas de nature à établir le bien-fondé des conclusions de la Partie Libyenne, non plus d'ailleurs qu'à remettre en cause l'argumentation juridique du Tchad dans son ensemble.

Cette "tactique du harcèlement" a une autre conséquence : elle oblige nos contradicteurs à se concentrer sur des points de détail. Or, comme l'a fait remarquer le professeur Crawford (CR 93/29, p. 32) à M. Sohier (CR 93/27, p. 66), ce n'est pas le Bon Dieu, mais c'est le diable qui est dans les détails.

5. Nous croyons, de ce côté-ci de la barre, que le débat judiciaire a pour objet de permettre à chaque Partie de justifier ses conclusions par des arguments juridiques qui devraient présenter une cohérence globale.

C'est pourquoi, Monsieur le Président, dans ce dernier tour de plaidoiries, nous nous sommes efforcés de montrer qu'en définitive toute notre thèse convergeait vers le traité du 10 août 1955. Ceci ne signifie pas que d'autres lignes d'argumentation ne permettent pas d'arriver au même résultat; et nous maintenons, en particulier, que l'on peut raisonner en fonction du titre territorial plutôt que de la ligne frontalière elle-même et que les effectivités coloniales puis l'exercice paisible de sa souveraineté territoriale par le Tchad indépendant justifient les conclusions que celui-ci vous a présentées. De même, nous sommes convaincus que, par eux-mêmes, les accords conclus entre les puissances coloniales à l'extrême fin du XIX^{e} siècle et au début de celui-ci ont établi la frontière dont la République du Tchad a établi le tracé. De même encore, nous pensons que cette frontière s'impose à la Libye du fait qu'elle y a acquiescé en tout état de cause.

Chacune de ces argumentations a ses mérites et pourrait se suffire à elle-même. Mais la caractéristique du traité franco-libyen de 1955 est qu'il en est, en quelque sorte, le point de convergence; je dirais presque qu'il les "transcende" toutes :

— il établit, sans doute possible, que les deux Parties ont un titre territorial de part et d'autre de la frontière qu'il détermine et, à cet égard, je voudrais ouvrir une petite parenthèse : le 6 juillet dernier, l'un des éminents conseils de la Libye a, à trois reprises, mentionné "l'éclat extraordinaire" ("the extraordinary outburst") (CR 93/27, p. 56-57) d'un conseil du Tchad, tout

aussi éminent, qui s'était interrogé sur le point de savoir comment la Partie libyenne conciliait sa théorie selon laquelle la France n'avait jamais acquis de titre territorial avec la reconnaissance par la Libye de la validité du traité de 1955 (CR 93/24, p. 42); ce n'était assurément pas un "éclat extraordinaire" (extraordinary outburst) que de se poser la question et je note simplement en passant que l'existence même du traité montre que les deux Parties se reconnaissaient mutuellement le titre territorial qu'aujourd'hui la Libye dénie — rétroactivement — à la France, le traité conforte les Etats dans leur titre territorial;

— de même, en *définissant* comme étant en vigueur entre les Parties les accords de délimitation antérieurs, le traité de 1955 lève tout doute que l'on pourrait avoir sur l'opposabilité de ces instruments à l'Italie puis à la Libye;

— de même encore, en y *reconnaissant* expressément que les frontières entre elles résultent de ces accords, les deux parties rendent superflue toute discussion sur la réalité et la portée des acquiescements antérieurs.

Bien entendu, je le répète, ceci ne signifie pas que les droits de la République du Tchad ne résultent pas, également, du titre territorial dont elle a hérité, de la part de la France, ou des accords de 1899, 1902 et 1919 ou des acquiescements antérieurs de l'Italie ou de la Libye. Cela signifie seulement que, puisque la Libye et la France se sont, en 1955, entendues sur le tracé d'une frontière, il est inutile, j'allais le dire, de "chercher plus loin".

6. Monsieur le Président, il est donc particulièrement important, en cette extrême fin de nos plaidoiries, de "faire le point" sur ce que nous avons à dire sur le traité du 10 août 1955 à la lumière des arguments qu'ont développés les conseils de la Libye en plaidoiries.

Dans un premier temps, le professeur Jean-Pierre Cot établira que ce traité répond à l'objectif fondamental de stabilité de tout règlement frontalier et qu'il doit être interprété à la lumière de ce principe.

Le professeur Higgins s'emploiera ensuite à montrer que la discussion sur le caractère constitutif ou déclaratif de notre traité, à laquelle se sont attardés nos contradicteurs, débouche sur une impasse.

Enfin, si vous le voulez bien, Monsieur le Président, M. Jean-Pierre Cot reviendra à cette barre et s'arrêtera plus précisément sur la notion d'actes internationaux en vigueur avant d'aborder la question de la bonne foi.

Monsieur le Président, Messieurs les juges, vous avez fait preuve de beaucoup de patience et de bienveillance en acceptant de m'écouter à plusieurs reprises, je vous en remercie très vivement, et je vous prie, Monsieur le Président, de bien vouloir donner la parole au professeur Cot.

The PRESIDENT : Thank you very much, Professor Pellet. Professor Cot.

M. COT : Monsieur le Président, Messieurs de la Cour. Nous en revenons à l'interprétation du traité du 10 août 1955, comme vient de vous le dire le professeur Pellet. C'est par là que nous avions commencé, lors du premier tour. C'est par là que nous terminons, logiquement, le second tour puisque nous estimons que l'application du traité du 10 août 1955 suffit à résoudre le différend qui vous est soumis. L'application du traité du 10 août 1955 et notamment de l'article 3 du traité et de son annexe I, que nous nous sommes permis de vous redistribuer pour le dossier d'audience aujourd'hui.

J'observe que la Partie libyenne vous a en effet projeté et distribué plusieurs avant-projets et extes alternatifs envisagés à un moment ou à un autre de la négociation (cf.Judge's Folder n[os] 12, 13, 87 et 96). Et ceci encore lors du dernier jour de ses plaidoiries par les soins du professeur Bowett. Mais qu'elle a oublié de vous distribuer le texte décisif, c'est-à-dire l'annexe I du traité ! Sans doute l'a-t-elle inclus dans ses écritures, mais vous n'en trouverez pas trace dans le *Livre vert*.

Je rappelle qu'aux termes de l'article 9 du traité du 10 août 1955, "les conventions annexes qui sont jointes au présent traité ... en font partie intégrante". J'ajoute que l'annexe I, en consignant dans un même instrument l'article 3 dont il rappelle les termes et la liste des traités de référence, affirme, par là même, l'unité de l'*instrumentum*, ce qui est une indication supplémentaire, Monsieur le Président, de la volonté des Parties de concevoir cet ensemble normatif comme un tout indissociable.

Pour interpréter le traité — je l'ai rappelé au premier tour — nous disposons d'un discours de

la méthode : la convention de Vienne, qui codifie votre jurisprudence. J'ai invité sir Ian Sinclair qui connaît bien ces dispositions — et pour cause — à appliquer ces dispositions à l'interprétation du présent texte. Mais il s'y est refusé, cherchant au contraire, avec talent et habileté, à mélanger les méthodes d'interprétation, à omettre des instruments essentiels et à recomposer à sa façon, un peu baroque, un traité fait de bric et de broc.

Il y a sans doute dans cette démarche une part de pragmatisme anglo-saxon que je salue, une défiance à l'endroit d'un cartésianisme trop carré. Il y a surtout ce que nous appelons en français la volonté de "noyer le poisson" pour éviter les conclusions auxquelles l'interprétation du traité du 10 août 1955, suivant les banales règles de l'art, conduit inéluctablement. Je suis donc placé, Monsieur le Président, devant la difficulté, soit de me répéter, soit de suivre sir Ian dans ses vagabondages et pérégrinations, au risque de perdre de vue l'essentiel.

Heureusement, M. Maghur nous propose une solution de sagesse pour nous tirer d'affaire :

> "In counsel's presentation, Libya will indicate for the Court the principal matters of substance in this case not adequately addressed in Chad's written pleadings, or in these oral proceedings, for the issues concerned to have been truly joined ... the failure to address points of evidence and arguments of an adversary may well result in a tribunal's construing such failure as tantamount to an admission."

J'userai donc de cette liberté, que nous propose notre confrère libyen, sans en abuser, rassurez-vous !

J'aborderai d'abord le principe cardinal de la stabilité et de la finalité du règlement frontalier. J'avais cité — je dirai presque pour mémoire — l'avis de la Cour permanente de Justice internationale dans l'affaire de l'*Interprétation du traité de Lausanne* et l'arrêt de la Cour internationale de Justice dans l'affaire du *Temple de Préah Vihéar* en relation avec ce principe. Sir Ian Sinclair m'a surpris par l'acharnement qu'il a mis à minimiser la portée des *dicta* que j'avais cités, comme il s'agissait de cas d'espèce ou d'*obiter* sans conséquence (CR 93/27, p. 29-30).

Je veux dire ici, à Sir Ian, mon désaccord complet. Ce ne sont pas les circonstances locales qui, dans ces deux affaires, ont conduit la Cour à constater la stabilité et la finalité du règlement territorial. Mais tout au contraire, c'est la recherche de la stabilité et de la finalité du règlement

territorial qui a conduit la Cour permanente a préconiser une ligne frontière complète dans l'affaire du Traité de Lausanne, et la Cour internationale à constater l'existence d'un *estoppel* et à écarter l'argument de l'erreur dans l'affaire du *Temple de Préah Vihéar*.

C'est bien le principe cardinal de stabilité des frontières qui a dicté la solution d'espèce et non l'inverse. Au demeurant, il ne s'agit pas d'une jurisprudence isolée.

Je ne veux pas lasser la Cour par le rappel de l'abondante jurisprudence afférante à ce principe. La Cour permanente a rappelé que la frontière doit être délimitée de manière complète et ininterrompue dans l'affaire de *Jaworzina* (*C.P.J.I. série B n° 8*, p. 32). Les tribunaux internationaux ont souligné l'exigence de stabilité dans l'affaire de *Grisbadarna* (*RSA*, vol. XI, p. 161), dans l'affaire des *Parcelles frontalières* (*C.I.J. Recueil 1959*, p. 221-222), dans l'affaire du *Canal de Beagle* (où le tribunal arbitral se réfère explicitement au *dictum* de la Cour dans l'affaire du *Temple de Préah Vihéar*, *ILR*, vol. 52, p. 131), enfin dans l'affaire de la *Mer Egée* où votre Cour a déclaré, à propos de la délimitation :

> "Qu'il s'agisse d'une frontière terrestre ou d'une limite de plateau continental, l'opération est essentiellement la même; elle comporte le même élément inhérent de stabilité et de permanence et est soumise à la règle qui veut qu'un traité de limite ne soit pas affecté par un changement fondamental de circonstances..." (*C.I.J. Recueil 1978*, p. 36.)

La doctrine, Monsieur le Président, est tout aussi abondante. Je me contenterai de relever avec les auteurs de la 9e édition d'Oppenheim : "qu'un tribunal saisi d'un litige frontalier", c'est le cas, "will have it in mind that 'one of the primary objects' of boundary settlement 'is to achieve stability and finality'" (p. 667-668).

Enfin, Monsieur le Président, Messieurs de la Cour, je ne reviendrai pas sur la démonstration menée hier par mon collègue le professeur Franck à propos de la stabilité des frontières africaines et de la mise en œuvre du principe *uti possidetis* dans le cadre de l'Organisation de l'Unité africaine. Le principe de la stabilité et de la finalité des frontières est bien un principe cardinal et d'application très générale.

Monsieur le Président, nous ne prétendons pas que ce principe soit d'application absolue. Les Parties contractantes peuvent fort bien l'écarter. Elles peuvent convenir de ne procéder qu'à une

délimitation partielle de la frontière. Mais nous disons que si ce principe a un sens, s'il n'est pas une formule creuse, une figure de réthorique, il doit agir à la manière d'une présomption, il doit éclairer l'interprétation des dispositions d'un traité ou d'un article de traité relatif à une frontière internationale. Comme l'a dit la Cour permanente dans l'affaire du *Traité de Lausanne*, et je vous prie d'excuser la répétition de cette citation d'une plaidoirie sur l'autre :

> "il est naturel que tout article destiné à fixer une frontière soit, si possible [et nous pensons que c'est le cas ici], interprété de telle sorte que, par son appliction intégrale, une frontière précise, complète et définitive soit obtenue" (*C.P.J.I. série B n° 12*, p. 20).

Je comprends l'embarras de sir Ian, sa réticence à accepter le principe et sa conséquence, qui est la présomption juridique qui en découle. Car il n'a pas d'éléments de preuve à apporter pour établir l'intention contraire des Parties. Nous l'avons montré au premier tour et je le rappellerai dans un instant. Ni le texte, ni le contexte, ni la pratique ultérieure n'établissent une telle intention contraire, pas plus que les travaux préparatoires.

Or, Monsieur le Président, écarter cette présomption serait ouvrir une voie fâcheuse pour la stabilité du règlement territorial, et par delà la présente instance. Je ne veux pas enfourcher les chevaux de l'apocalypse dont nous avons parlé, mais si vous suivez nos contradicteurs dans leur raisonnement, vous invitez à une relecture générale et critique des clauses territoriales des traités. Aussi j'ai confiance que vous maintiendrez cette présomption de stabilité et de finalité du règlement frontalier.

Vérifions maintenant si la Partie libyenne a réussi à renverser cette présomption, au moyen de preuves nouvelles et décisives.

Monsieur le Président, Messieurs de la Cour,

Prenons d'abord l'objet et le but du traité. Mon honorable contradicteur a ironisé sur mon analyse du préambule du traité. J'ai souligné que les Parties contractantes entendaient faciliter le règlement de toutes les questions que posent pour les deux pays leur situation géographique. Le préambule, nous le savons bien, n'est qu'une pièce dans le dispositif d'ensemble. C'est un peu plus qu'une "nicety". Il annonce la volonté de contribuer au règlement de toutes ces questions.

Cette volonté qui est mise en œuvre dans le dispositif du traité par l'article3 et l'annexe I qui définissent les frontières entre les deux Hautes Parties contractantes et qui prévoient une procédure de démarcation. Délimitation de toute la frontière entre les deux Parties, ou plus exactement — sir Ian a raison sur ce point — de toutes les frontières entre les deux Parties.

Pourquoi ce pluriel ? J'aurais tendance à dire parce qu'en bon français on parle des frontières de la France ou des frontières de l'Ecosse; mais aussi sans doute parce que le statut juridique des possessions françaises d'Afrique de l'époque est très divers : protectorat, département, territoire d'Outre-mer. Quoi qu'il en soit, cette considération grammaticale, ce pluriel, n'affecte en rien l'impératif de stabilité et de finalité du règlement frontalier entre les Parties contractantes.

Quant à l'hypothèse des deux segments de frontière, l'un délimité, l'autre "à délimiter" quant à l'hypothèse corrélative du mandat implicite de négociation sur les portions de frontière qui ne sont pas délimitées, je n'en vois toujours pas l'esquisse d'une preuve, ni dans le texte, ni dans le contexte, ni dans les travaux préparatoires.

Sir Ian Sinclair a sans doute raffiné son hypothèse en distinguant quatre segments et non pas deux, quatre segments relevant d'instruments conventionnels différents. Il enfonce une porte ouverte, permettez-moi de le lui dire, puisqu'il n'établit en aucune manière la volonté des Parties de traiter de manière spécifique et différente les segments de frontière suivant le traité de référence. Je puis donc renvoyer la Cour à ma plaidoirie du premier tour à ce sujet (CR93/22, p. 11-14). Je n'ai rien à y ajouter.

Les Parties n'ont pas seulement entendu délimiter toutes leurs frontières. Elles ont prévu une procédure de démarcation pour aplanir toute difficulté sur le terrain. Les diplomates français et libyens connaissaient bien la distinction entre délimitation et démarcation. On nous a rappelé avec insistance que ce sont les représentants de la France qui ont introduit cette distinction lors des débats aux Nations Unies (CR 93/27, p. 35.) Et sir Ian Sinclair a même rendu à ce propos un hommage appuyé à la diplomatie française !

Il n'a d'ailleurs pas contesté que la démarcation présuppose une délimitation, une frontière déjà délimitée. De ce fait, il s'est trouvé devant une difficulté : comment expliquer la mise en place

d'une procédure de démarcation et non pas une procédure de délimitation de la frontière entre les deux Parties ? Notre contradicteur a essayé de contourner la difficulté en interprétant les alinéas relatifs à la procédure d'abornement, ceux qui sont inscrits dans l'annexe I, comme s'appliquant uniquement au secteur compris entre Ghât et Toummo (CR 93/27, p. 47-48), et en faisant observer que ces alinéas sur l'abornement suivent l'alinéa où les deux Parties fixent les trois points qui doivent permettre de délimiter la frontière dans ce secteur. Il cherche ainsi à fragmenter l'effet de l'annexe I et à réduire à un segment particulier ladite procédure d'abornement.

Messieurs de la Cour, cette interprétation ne résulte en aucune manière du texte même de l'annexe I, qui vise : "l'abornement de la frontière *partout* où ce travail n'a pas encore été effectué et où l'un des deux gouvernements l'estimerait nécessaire".

Mais j'ajoute que cette interprétation visant à fragmenter l'effet de l'annexe I est démentie par le comportement ultérieur des Parties, comme en témoigne l'incident d'Inoharten (mémoire du Tchad, annexes 276 et 278) Inoharten, Monsieur le Président, Messieurs de la Cour, est situé au nord de Ghât, dans la région d'Edjelé. A la suite d'un incident de frontière, le premier ministre Ben Halim demande, en mars 1956, l'application de la procédure d'abornement prévue par l'annexe I du traité de 1955.

Le Gouvernement français y consent. Il fait simplement observer que le traité de 1955 n'est pas encore entré en vigueur et qu'il ne peut pas s'agir formellement de l'application de la procédure prévue par le traité de 1955. Mais pas plus le Gouvernement français que le Gouvernement libyen en l'espèce ne cherchent à limiter la procédure d'abornement au secteur compris entre Ghât et Toummo et qui ne comprend donc pas la région de Inoharten.

Alors, nous dit-on, pourquoi le Gouvernement français n'a-t-il pas demandé la démarcation de toute la frontière, et notamment de la frontière entre Tommo et le Soudan, s'il croyait que cette frontière était déjà délimitée par le traité de 1955 ? Mais parce qu'il n'y avait aucune nécessité de délimiter cette frontière ! Une procédure d'abornement est une procédure difficile, onéreuse, surtout dans les circonstances de l'époque, en 1955, où l'on ne disposait pas des moyens actuels pour l'opérer, et surtout dans une région désertique, inhospitalière, comme peut être le Tibesti. Dans ce

secteur, et par application des textes de référence, la délimitation est parfaitement fixée par renvoi à des coordonnées astronomiques précises; la ligne frontière ne traverse en 1955 ni agglomération, ni cultures, ni installations militaires. Les caravanes vont nécessairement d'un point d'eau à un autre. Chacun de ces points étant situé précisément par rapport à la frontière d'un côté ou de l'autre, cela suffit pour les contrôles éventuels. Personne, heureusement, n'a à ce moment-là l'idée saugrenue d'installer une barrière frontière avec douanier et petite casquette en plein désert. Dans ce secteur, la démarcation n'avait aucun sens.

Je constate donc que, sur ce point, la Partie libyenne n'a pas apporté d'élément tendant à prouver qu'en 1955 les Parties avaient l'intention de soumettre à un traitement différent tel ou tel segment de la frontière. Le texte de l'article 3 ne distingue pas entre les frontières en cause. Le texte de l'annexe I énumère toutes les conventions applicables et sans faire de distinction entre elles. La procédure de démarcation prévue est applicable, en tant que de besoin et à la demande de l'une ou l'autre Partie, à toute portion de la frontière ou des frontières quelles qu'elles soient.

Monsieur le Président, j'en viens maintenant au contexte.

Nos adversaires ont été assez silencieux sur le contexte. Je me permets donc d'invoquer ici la "doctrine Maghur". L'article 4 et l'article 5 renvoient à l'article 3 pour la définition de la frontière; ils en impliquent donc l'existence. La convention sur le bon voisinage de même. La convention particulière de même, qui situe explicitement, nous le savons, la région de Muri Idie en territoire tchadien et confirme l'appartenance de la bande d'Aouzou au territoire tchadien. Enfin, l'hypothèse d'une illusoire zone de défense n'a pas été ressuscitée dans la réplique de nos contradicteurs (cf. CR 93/22, p. 14-17).

Sir Ian Sinclair m'a reproché d'être réticent sur la pratique ultérieure des Parties (CR 93/17, p. 48-49). Je vise ici la pratique ultérieure telle qu'elle est définie par l'article 31 de la convention de Vienne, c'est-à-dire celle qui établit "l'accord des parties à l'égard de l'interprétation du traité". J'avais retenu deux textes à ce titre. Contrairement à ce que prétend sir Ian, l'accord du 26 décembre 1956 ne réduit pas à néant notre affirmation suivant laquelle le traité du 10 août 1955 entendait définir la ligne frontière sur toute sa longueur. Pourquoi l'accord de 1956

est-il conclu, je vous le demande ? Est-ce parce qu'il n'y a pas de frontière de délimitée entre Ghadamès et Ghât, le secteur concerné ? Mais, pas du tout ! C'est parce que la frontière telle qu'elle est délimitée par l'accord du 12 septembre 1919 et auquel renvoie le traité de 1955, cette frontière-là ne convient pas à la France, et que celle-ci veut, par une interprétation authentique, arrondir son territoire dans le secteur de manière à comprendre l'ensemble du gisement pétrolier récemment découvert à Edjelé.

Nos contradicteurs évoquent à ce propos, non sans raison, le chantage de la France à la ratification du traité du 10 août 1955 (CR 93/15, p. 61). En acceptant l'amendement Isorni à l'Assemblée nationale française — et je rappelle que maître Isorni sera un des chantres de l'Algérie française — le Gouvernement français lie en effet le sort du traité du 10 août 1955 à l'adoption préalable de l'interprétation authentique de la ligne frontière dans le secteur d'Edjelé. Nous avons relaté tout ceci dans notre mémoire et y avons annexé la documentation parlementaire et diplomatique correspondante.

On ne peut donc en aucune manière voir dans l'accord de 1956 une interprétation du traité dans le sens allégué par nos contradicteurs, c'est-à-dire une constatation de l'absence de délimitation; il s'agit bien ici d'interprétation authentique, de rectification.

Vous me permettrez ici, Monsieur le Président, une petite digression. Sir Ian a cité et commenté deux lettres datées de 1960, l'une du ministre des affaires étrangères, M. Maurice Couve de Murville, l'autre de l'ambassadeur de France à Tripoli, M. Pierre Sébilleau (CR 93/27, p. 32-33).

Ces documents, postérieurs de cinq ans au traité de 1955, ne constituent pas un accord entre les parties sur l'interprétation de notre traité. Ils ne disent d'ailleurs pas ce que sir Ian voudrait leur faire dire.

Ces lettres concernent principalement le secteur Ghât-Toummo, c'est-à-dire le secteur qui a fait l'objet d'une délimitation spécifique par référence à trois points géographiques par le traité de 1955. Elles ne disent pas du tout que la délimitation est inexistante, mais qu'elle n'est pas satisfaisante, qu'il faut la compléter — l'ambassadeur parle d'un abornement général; on n'envisage donc pas une délimitation de *novo*. A mes yeux, tout ceci ne méritait pas tant d'honneur de la part

de sir Ian.

Monsieur le Président, je me dois ici de relever une petite négligence de la part de nos contradicteurs. Sir Ian a cité la lettre de l'ambassadeur Sébilleau; or, la réplique libyenne n'en reproduit qu'une partie jusqu'à la page 8 (lettre du 13 juin 1960, réplique de la Libye, pièce 6-10, p. 1-8; cf. aussi la traduction anglaise de cette pièce, qui indique que le document transmis au Greffe est incomplet). La suite manque, mais par pour tout le monde, puisque sir Ian a pu compléter la phrase commencée dans la dépêche. Cette petite négligence que je n'impute aucunement à notre ami Ian Sinclair, connaissant son scrupule et sa probité, ne mériterait pas d'être relevée s'il n'y avait pas récidive.

C'est la quatrième fois, Monsieur le Président, que la Partie libyenne présente un document intéressant, mais n'en dépose qu'une version incomplète au Greffe, et ceci en violation de l'article 50 de votre Règlement.

La première fois, ce fut à propos de l'*exhibit* 73 du mémoire libyen, c'est-à-dire des minutes libyennes de la négociation finale.

La deuxième fois, ce fut à propos de l'*exhibit* 74 du mémoire libyen, c'est-à-dire du rapport de mission du colonel Latyoush du 4 août 1955. J'aurai l'occasion d'y revenir dans la seconde moitié de ma plaidoirie et nous vous l'avons distribué dans notre dossier d'audience de ce jour afin d'en faciliter la consultation.

La troisième fois, ce fut à propos de ce curieux document (réplique de la Libye, pièce 6-4) dont j'avais questionné l'origine. M. Maghur nous a pleinement rassurés sur la provenance honorable de ce document (CR 93/27, p. 15). Mais il a ajouté :

> "what these transcripts brought out, among other things, is that Libya did not wish or intend to deal with the delimitation of Libya's boundaries in the 1955 Treaty".

J'ai cherché à vérifier dans la pièce annexée à la réplique libyenne l'exactitude de cette affirmation qui ne correspondait pas à mon souvenir. Je n'ai rien trouvé de tel, Monsieur le Président.

Je me suis alors rendu compte que la Partie libyenne n'avait là aussi fourni que des *extraits* de ce curieux document et n'en avait pas déposé le texte intégral au Greffe.

Monsieur le Président, quatre violations successives de l'article 50 du Règlement de la Cour, cela fait beaucoup ! Nous ne cherchons pas l'incident de procédure, mais vous conviendrez que tout cela fait un peu désordre.

Après l'accord de 1956, le second texte qui, à notre avis, relève de la pratique ultérieure entre les parties, est la convention de bon voisinage du 2 mars 1966. Le professeur Cahier a analysé cette convention jeudi dernier (CR 93/28, p. 59-61). Ce traité reprend pour l'essentiel les dispositions de la convention de bon voisinage de 1955. C'est la raison pour laquelle nous n'avions pas cru nécessaire, dans notre première intervention, de répéter à propos de la convention de 1966, les observations que nous avions faites à propos de la convention annexée au traité du 10 août 1955. Je note, pour être complet, que les articles 1, 2, 6 et 8 de la convention de 1966 visent explicitement soit la frontière entre les deux pays, soit deux zones frontalières distinctes : l'une tchadienne, l'autre libyenne, de part et d'autre de la frontière. Voici qui ne correspond guère à l'analyse, par M. Cahier, d'une vaste "zone frontière" telle qu'il nous l'a projetée sur grand écran l'autre jour. Vous me permettrez d'ajouter à ce propos, Monsieur le Président, deux remarques

1. Les deux conventions de bon voisinage, celle de 1955 et celle de 1966, instituent bien, à cheval sur une frontière délimitée par ailleurs par l'article 3 et l'annexe I du traité, une zone frontalière régie par des règles communes. Mais l'institution d'une telle zone frontalière n'abolit pas la frontière linéaire pour autant. Je rappelle à la Cour la sentence rendue par le tribunal arbitral dans l'affaire du *Lac Lanoux* : le Gouvernement espagnol y invoquait l'existence d'une "zone organisée conformément à un droit spécial de caractère coutumier, incorporé au droit international par les traités de délimitation qui l'ont reconnue" (*RSA*, vol. XII, p. 307).

> Dans cette affaire, le tribunal arbitral a mis les choses au point en ces termes :
> "il est impossible d'étendre le régime des compascuités au-delà des limites qui leur sont assignées par les traités, ni d'en faire découler une notion de 'communauté' généralisée qui aurait un contenu juridique quelconque. Quant au recours à la notion de 'frontière zone', il ne peut, par l'usage d'un vocabulaire doctrinal, ajouter une obligation à celles que consacre le droit positif."

Et M. Cahier, qui est un éminent représentant de la doctrine, il nous l'a rappelé l'autre jour, avance ici un concept, celui de frontière-zone qui n'a pas plus de consistance juridique aujourd'hui

qu'en 1957.

2. Ma seconde remarque porte sur la manière dont le professeur Cahier a décrit la zone frontalière instituée par l'article 2 de la convention de bon voisinage de 1966. Il a fait observer, vous vous en souviendrez peut-être, qu'il y avait sept cent cinquante kilomètres entre Faya au sud et le point septentrional de la zone définie, soit davantage, disait-il, qu'entre Nice et Paris ! Je mets d'ailleurs cette remarque en parallèle avec les affirmations répétées du professeur Bowett relatives à l'impossibilité, pour un contingent de quelques centaines d'hommes, d'assurer la présence effective d'un Etat dans de si vastes espaces. Si je les ai bien compris, mes collègues n'ont pas eu la chance que nous avons eue de visiter ces superbes contrées dont nous parlons. Ils auraient survolé à basse altitude pendant des heures des plateaux sans apercevoir âme qui vive, peut-être un berger et quelques bêtes étiques ici où là. Ils auraient constaté, dans les quelques palmeraies, une population agglomérée mais en petit nombre car les ressources de l'élevage ne permettent pas d'y faire vivre des masses nombreuses.

La densité de population dans le BET est de 0,2 habitants par kilomètre carré. Dans la bande d'Aouzou, on peut estimer la population à combien? Environ cinq mille habitants pour 120 000 kilomètres carrés, un habitant pour 20 kilomètres carrés. Si mes souvenirs de géographie sont exacts, dans un pays comme celui où nous sommes aujourd'hui, la proportion est légèrement différente : largement plus de deux cents habitants pour un kilomètre carré. Si j'insiste sur ce point, Monsieur le Président, c'est parce que l'exercice des actes à titre de souverain y est nécessairement différent, sporadique. L'ordre y est maintenu par des patrouilles de ce qu'on appelait naguère des méharistes; les services publics opèrent ponctuellement plutôt que par présence à poste fixe. La notion même de zone frontalière y est fort différente de celle que nous connaissons en Europe. Le trajet de Gatroum à Faya ne ressemble en rien au trajet de Paris à Nice, et la zone frontalière visée par les conventions de bon voisinage de 1955 et de 1966 a peu de choses à voir avec les zones franches de Haute-Savoie et du pays de Gex ! Elle n'en est pas moins une zone frontalière chevauchant une ligne frontière définie par les traités de référence.

Monsieur le Président, Messieurs de la Cour, l'application des moyens principaux

d'interprétation confirme donc à nos yeux très largement la présomption posée par le principe de stabilité et de finalité de la ligne frontière. A nous en tenir au texte, inséré dans son contexte, éclairé par l'objet et le but du traité et compte tenu de la pratique ultérieure des Parties, l'article 3 et l'annexe I du traité du 10 août 1955 ont bien pour objet et pour effet de déterminer les frontières entre les deux Parties sur toute la longueur et notamment de Toummo à la frontière soudanaise.

Mais c'est ici que sir Ian Sinclair sort sa botte secrète. Tout cela ne tient pas, dit-il, puisque l'article 3 est déclaratif et non constitutif.

J'ai eu l'occasion, au premier tour de plaidoiries, d'expliquer pourquoi cette thèse nous paraît mal fondée, pourquoi ce problème nous paraît être un faux problème, inventé par nos contradicteurs pour se tirer d'un mauvais pas. J'ajoute que, si nous suivions notre honorable contradicteur sur ce terrain, nous serions, à ce moment-là, en opposition complète avec toutes les dispositions relatives aux frontières et au régime frontalier posées par les traités de 1955 et de 1966 et que je viens de développer. Mais comme la thèse libyenne s'attaque au cœ ur du traité et de la solution qu'il pose en matière frontalière, nous allons maintenant la soumettre à réexamen, un réexamen que Mme le professeur Higgins va nous présenter.

Mr. President, as we will be stopping a bit early this morning, you may perhaps find it convenient to interrupt the pleadings at this time, even if it is a bit early, and to take the coffee break before calling upon Professor Rosalyn Higgins.

The PRESIDENT : Yes, if that fits in with the general plan, Professor Cot, thank you very much, and we'll take our break now.

L'audience est suspendue de 10 h 50 à 11 h 15.

The PRESIDENT: I give the floor to Professor Higgins.

Mrs. HIGGINS: Mr. President, Members of the Court, Libya is faced with a treaty that it signed and ratified, and which disposes of the issue in dispute: where is the frontier? To avoid this unpalatable reality, Libya engages in feats of escapology of the most daring kinds, greatly enjoyable for the spectator. These attempted feats of escapology take the form of a veritable series of legal propositions of the most imaginative sort: for example, the *Western Sahara* Advisory Opinion decides France could never have got title: the choice is between *res nullius* and conquest; the League Covenant always prohibited colonial title by military occupation; a doctrine of non-succession to acquiescence will set aside legal notions of opposability. The introduction of declaratory and constitutive theories of recognition into boundary treaties is another such.

2. Libya demands that we follow them down all these escape routes, assisting them in avoiding the arm of the law by answering all their chosen questions. We mostly think the questions irrelevant to the issue at hand and we don't feel very inclined to assist them in their attempt to escape the 1955 Treaty. But, litigation being what it is, we have endeavoured to make our views known to them and to the Court.

3. What is the Libyan thesis on Article 3 and constitutive and declaratory theories of recognition. I am going to try, without artifice, to restate what we understand Libya to be saying and I need to recall, one more time, what Article 3 of the 1955 Treaty says:

"Les deux Hautes Parties Contractantes *reconnaissent* que les frontières séparant les territoires de la Tunisie, de l'Algérie, de l'Afrique occidentale française et de l'Afrique équatoriale française d'une part, du territoire de la Libye d'autre part, sont celles qui résultent des actes internationaux en vigueur à la date de la constitution du Royaume Uni de Libye tels qu'ils sont définis dans l'échange de lettres ci-jointes."

—and then there is the reference to Annex I.

4. The Parties have taken different views on the meaning of several elements in Article 3, including "celles qui résultent" and "actes internationaux en vigueur"and "qu'ils sont définis". Libya says our understanding of "reconnaissent" is important of itself and because it illuminates our understanding of these other terms.

5. It is Libya's view, stated clearly in its Reply, para. 5.38, that:

"The use of the word 'reconnaissent' demonstrated that it was designed to be *declaratory* of existing boundaries and not *constitutive* of boundaries where no boundaries have previously existed."

6. What does Libya take from that argument? Well, Libya says that "to recognize" a boundary indicates a choice for a declaratory approach (whereas, presumably, "to agree" would indicate a choice for a constitutive approach). This means that the 1955 Treaty effected no delimitation of frontiers — it merely recognized frontiers *that already existed*, and were opposable to Libya, by virtue of international instruments in effect in 1951.

7. The breadth of Libya's dismissal of the 1955 Treaty as a frontier settlement is striking. Libya says in its Counter-Memorial, 3.04:

> "Article 3 provided that Libya and France *recognized something about certain boundaries* .... Although Article 3 *fixed no boundaries*, it recognized those boundaries that had already been fixed under international agreements in force in 1951." (Emphasis added.)

Some frontiers, says Libya, might indeed already have been fixed before 1951 and these Libya specifies in its Reply (para. 5.22). But not the boundary east of Toummo, and it further could not be regarded as opposable to Libya because in 1951 the Accord of 1902 was not "en vigueur". In a slightly curious way of putting it, Libya contends that "neither the 1900 nor the 1902 Franco-Italian Accord *produced a boundary*" (CML, para. 3.11; emphasis added). Chad does not look to the 1902 Accord to "produce a boundary" — that was done by the 1899 and 1919 Conventions. But it is part of the story of opposability of an existing boundary to Italy, and in turn, to Libya.

8. In short, the use of "reconnaissent" allows invocation of the doctrine of the declaratory effect of recognition and a *renvoi* only to boundaries already in existence in 1951.

9. Mr. President, Members of the Court, Chad has made clear in its Counter-Memorial (para. 11.28) that it regards these alternative views of recognition — the declaratory versus the constitutive — with indifference. Even if we were to step on to Libya's ground, and accept that there are choices to be made between the declaratory and constitutive theories, in our view it makes no difference at all. If the word "reconnaissent" operates in a declaratory fashion, then the frontier line Chad contends for was indeed already in existence in 1951 by reference to these instruments of

reference. Nor, even on the declaratory view, is an escape route provided by the fact that the 1902 Accord was not in 1951 "en vigueur".

10. The inclusion of the phrase "en vigueur" was to *exclude* the 1935 Treaty. Not only would it not appear in the annex, but these words would underline that an end had now come to the constant invoking of an instrument that had no legal significance. As for the fact that the 1902 Accord is listed, but was not, objectively speaking, "en vigueur" in 1951 — the parties in 1955 simply chose to treat it as the category of instruments "en vigueur" at that date. The listing of the 1902 Treaty was deliberate, a clear act of will by the parties.

11. The parties were not seeking to engage in their own juridical analysis. The term "in effect", "en vigueur", was used descriptively, and not as a precondition to the operation of the other terms of the Treaty. The phrase was certainly *not*, as Libya has contended, an "overriding condition" for Article 3 to operate (CML, para. 4.04). Even if the *fact* of 1902 being "en vigueur" was an error (but not its listing by the parties), where does that take us? The Court in the *Preah Vihear* case, in the famous *dictum* where it affirms the principle of stability of frontiers and definitive solutions, says:

> "This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors will remain to be discovered." (*I.C.J. Reports 1962*, p. 34)

12. And we may think that, where the parties clearly determine to delimit a frontier, as was the case in 1955, error should play an equally small part in destabilizing that intention. Further, the use of the term "recognize" at once underlines this and is a guarantee against reliance on error. In Chad's submission this must work as a principle of interpretation for boundary treaties entering into force as much as for long established boundary treaties.

13. If, of course, the 1955 Treaty is to be regarded as "constitutive", then that too is fine with Chad. If the 1955 Treaty is creating obligations *de novo*, and creating frontiers where none had existed before — then even if our boundary did not already exist (which it did), that too provides a frontier, and Libya agreed.

14. In case a constitutive effect is intended by this recognition, says Libya, it had better

address some remarks to the Court on that. And this has been done by Sir Ian Sinclair. The constitutive possibility that Libya advances as an unthinkable alternative is dealt with essentially by crying "foul". Without asking the Court to set aside the 1955 Treaty, Libya rather urges it not to interpret it as having "constitutive effect", because that would be to ignore Libya's disadvantage and ignorance in entering into it. The "pauvre Libye" plea is heard not to invalidate the Treaty, but to interpret it to say what it doesn't. And as to the merits of that claim, Members of the Court, you will hear more from Professor Cot.

15. So Chad has felt no special need to make the choices that Libya wants us to make.

16. But in any event, Mr. President, Members of the Court, there is another reason why Chad has no interest in making these choices for Libya. It is this. We believe that, not only in terms of the *consequences*, but as a *matter of law*, a choice between declaratory and constitutive theories *simply does not arise*.

17. Recognition performs a variety of functions in international law, and is itself of many different kinds, directed at different objects. And the common thread is that recognition involves the perceived or publicly stated acceptance by a State of any fact or situation in its relations with any other State. Eric Suy has described it thus:

> "La reconnaissance est une manifestation de volonté unilatérale par laquelle un sujet de droit constate une situation donnée et exprime la volonté de la considérer comme étant conform au droit." (*Les actes juridiques unilateraux en droit international public*, 1967, p. 190.)

There is an endless possibility of facts that might fall for recognition. The situations are a little easier to cluster: new States are born. Governments change in a violent or unconstitutional manner. Hostilities occur between nations. Civil wars rage within States. Territorial sovereignty falls to be allocated. And boundaries are definitively settled.

18. Most of these types of recognition occur as unilateral acts. One State will simply decide whether to recognize another State, or government, or state of belligerency. Where non-recognition is being used to secure political ends, the decision may be multilateral, within the United Nations or other regional groupings. And sometimes the appropriate vehicle for the manifestation of a recognition is a treaty. And boundary determinations are very often done by treaty, and the

recognition of the frontier concerned will be an element within that treaty or international act. The instrument can be multilateral (as in the Helsinki Final Act) or bilateral (as in the 1955 Treaty between France and Libya).

19. To ask whether an obligation contained within a treaty is constitutive or declaratory is to ask a non-question. And that is why, in spite of Libya's protestations, Chad has declined to respond to the question in respect of the 1955 Treaty. Recognition of facts and situations other than the birth of new States is neither declaratory nor constitutive. And treaty terms means simply what they say, no more and no less, and are binding as such. When a treaty is the vehicle used to express the willingness to recognize a fact or situation, the meaning and scope of the terms is to be decided by reference to the principles of treaty interpretation, and not the recognition of States.

20. Now Professor Cot has already addressed the Court on the principles of treaty interpretation relevant to Article 3 and Annex I of the 1955 Treaty. And the matter is further elaborated in our written pleadings.

21. A study of the literature confirms this analysis. The classic starting-point for any discussion on recognition, and especially on the debate about the constitutive or declaratory nature thereof, has to be Sir Hersch Lauterpacht's celebrated book on *Recognition and International Law*. I believe that even civil lawyers will accept that! And we may remind ourselves of his precise words, he said:

> "To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law ... Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood." (P. 6)

22. The declaratory/constitutive debate has relevance only to the recognition of States. The "fact"being recognized — that a new international actor has been born — is the ultimate threshold question for a system predicated on sovereign States. The very existence of a subject of international law is what is in issue. In that context, one perfectly understands the relevance of the question: is the recognition by others of a claimant's statehood itself a prerequisite for the statehood? In other issues, the declaratory/constitutive debate has no functional purpose. No other circumstances in which the issue of recognition arises presents the same sort of threshold question.

Thus the recognition of a government will have certain consequences fo relations between the two States; but it does not determine whether the *government exists*. Recognition of belligerency is relevant for the rights that will be accorded to the recognized party in certain fact situations. As Lauterpacht has put it, it triggers "a duty imposed by the facts on the Situation"(*Recognition in International Law*, p. 175). But recognition here does not determine *the existence of the hostilities*. There is no occasion to ask the question that the declaratory/constitutive debate seeks to address; namely "Does my recognition make the entity EXIST?" To ask "Is to recognize a state of hostilities in country X constitutive or declaratory?" is meaningless. It is not coincidental that the doctrine has received such attention as it has in the context of the recognition of statehood — it has no place in other forms of recognition.

23. And even in the context of statehood the concept has attracted more interest in the literature that in State practice. States recognize other States without asking themselves whether what they are doing is constitutive of the birth of the new State, or declaratory of its existence. A paucity of numbers recognizing a new State — perhaps because the international community has called for non-recognition (as with the Bantustans, or the Turkish Federated State of Cyprus), or perhaps for other reasons (as with Biafra) — will have undoubted consequences. But few States today regard those consequences as usefully described by reference to constitutive or declaratory views of recognition. The topic attracts less and less attention also in the literature — in most of the leading works it receives brief reference as a point of historical interest. It is striking that it is only accorded a passing reference in the 9th edition of *Oppenheim*, the 8th edition of which had, of course, been edited by Sir Hersch Lauterpacht.

24. What place, then, could the constitutive and declaratory debate have in the recognition of another State's claims, or of a boundary line? The answer is none. Recognition here serves not to open the somewhat sterile theoretical debate, but totally other purposes. Formally to recognize

a fact, or a legal situation, is to be estopped from denying the fact or situation. A common lawyer, John Fisher Williams, said in his Course on Recognition at the Academy of the Hague in 1933 (a course apparently given in French):

> "On donne à la reconnaissance une fonction qui ressemble à celle de l'estoppel' (empêchment) en droit anglais: quand un Etat a reconnu une prétention, il est empêché (estopped) de la contester." (*RCADI* (1933-II), Vol. 44, at p. 210.)

The sam view was taken by Anzilotti, who said that:

> "la reconnaissance peut produire en droit international un effet semblable à celui de la prescription en droit privé" (J.F. Williams, at 210, citing Anzilotti, *Cours de droit international*, Recueil Sirey, Paris, 1929).

25. Mr. President, Members of the Court: we have said that the matter is not one of declaratory and constitutive theories of recognition, but of the interpretation of Article 3 and Annex I in accordance with its plain meaning, its context, and in a way that is not absurd and empties it of all substance. But in doing *that* the use of the word "recognize", "reconnaissent", still has an importance — but not the importance Libya hoped for.

26. There is ample evidence, on your jurisprudence and in the leading writings, that *recognition* of a situation entails certain important consequences of law. The use of the term signifies a common desire for certainty; an intention of the parties to put disputes behind them; a commitment to the stability of frontiers; and a preclusion from making claims contrary to what has been recognized.

27. In territorial and frontier matters the term "recognize" is employed only when there is a *certainty* about the fact or situation at hand. It is not a term that is brought into play when there is any hesitation about the status of territory, or delimitation of the frontier, as the case may be. Thus in the *Jaworzina, Advisory Opinion (P.C.I.J., Series B, No. 8*, p. 32) the Permanent Court said:

> "The clauses relating to the immediate recognition of the sovereignty of the States concerned over the territories . . . presuppose the existence of a territory defined and delimited in all respects, especially in relation to the other State.

"28. One also finds the term "recognize"frequently employed in frontier agreements concluded in circumstances where there has been a history of problems and of conflict, or of difficult bargains struck. One party offers a consideration, a *quid pro quo*; the other party is required to recognize the frontier line. The term reflects "the deal struck". One gets the sense of this in the agreement made between France and Turkey of 23 June 1939, concerning the settlement of the Turkish-Syrian

territorial problems. France ceded the Sandjak of Alexandrette to Turkey. And in turn, Article 7 provided that "la Turquie reconnaît comme constituant la limite définitive de son territoire la ligne" that was there described.

29. In 1955 Libya secured the prize of French withdrawal from the Fezzan. Libya tells us that this was really what the 1955 Treaty was all about, that any delimitation was for the future, for possible arrangements quite outside of the Treaty. But the reality is that Article 3 is the *quid pro quo*, whereby there was to be a *recognition* of the 1899 frontier line. There, in contrast to the Franco-Turkish Agreement of 1939, the term is drafted as an obligation falling on both parties, to be sure. But it entailed for Libya alone the renunciation of its preferred line, the 1935 line.

30. Recognition entails that no contrary claim will be advanced, in circumstances where otherwise such claims might have been expected to continue. In the *Rights of Passage* case (*I.C.J. Reports 1960*, p. 39) the Court describes how

> "The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them . . . Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory."

31. Recognition here led to the consequence because of possible claims not being pressed. Where recognition of a situation is a *treaty* obligation, *expressly made* as in the 1955 Treaty, how much more strongly can we see this principle of an obligation not to pursue inconsistent claims.

32. This situation was clearly put in the *Legal Status of Eastern Greenland* case, where pointing to certain bilateral and multilateral agreements, the Permanent Court said:

> "In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland . . ." (*P.C.I.J., Series A/B*, No. 53, p. 69.)

33. Hans Blix has drawn a contrast between recognition of subjects of international law, and other forms of recognition. As to the latter, for example, "recognition of a border", he says, "recognition in these cases conveys an acceptance of the claim and implies a readiness to respect it in practical contacts" *RCADI* (1970-II), Vol. 130 at p. 599).

34. The stability function of the term "recognized", when used in a boundary treaty, is emphasized in the observation of Georg Schwarzenberger:

> "However weak a title may be, and irrespective of any other criterion, recognition estops the State which has recognized the title from contesting its validity at any future time."

35. So the jurisprudence of the Permanent Court, of this Court, the unanimous opinion of the leading jurists, all show that recognition of a boundary entails a commitment to finality of any dispute and the stability of frontiers. It also reflects a commitment to certainty; and entails the consequence of estoppel for the recognizing party or preclusion of inconsistent claims. And this is so whether the recognition is advanced unilaterally or whether a treaty is the vehicle for such recognition.

36. If, as in our case, a treaty is the vehicle for such recognition, these legal consequences are encased within an instrument that of itself, and even without specific mention of "recognition", intends the exchange of binding obligations: *pacta sunt servanda*. We may say that it is somewhat analogous to a stabilization clause, which serves in a treaty *already binding* to underline the importance to the parties of certain provisions; and so does the introduction of the concept of recognition into a treaty that already, by virtue of the legal nature of a treaty, binds the parties to accept the obligations contained in it.

37. What then of our Treaty, the Treaty of 1955, and in particular Article 3 and Annex I? What do we know of the introduction of this word "recognize" ("reconnaissent")? Is its purpose to introduce notions of declaratory effect, as Sir Ian has suggested — or is it to achieve exactly what that term is usually introduced to achieve in boundary treaties, that is to say, the finality and the other consequences of which I have been speaking? The Libyan pleadings, I would remind the Court again, claim that the introduction of the word "*reconnaissent*" was "*designed*" to be declaratory of existing boundaries (RL, para. 5.38).

38. Mr. President, Members of the Court, the evidence is rather clear on this. Let us begin with the negotiating documents of the parties. The background is that already, in late 1954, rumours were circulating of a Libyan intention to occupy Aozou. This is evident from evidence produced by both Libya and Chad at the written phase (see ML French Archives, P166; MC, No. 262). One can see from the "projet de procès-verbal" emanating from the French Administrative Services, of 30 March 1955, that, while certain matters under consideration were still the subject of different formulae being exchanged by France and Libya, a common formula had been found in paragraph IV, on frontiers and that common formula said:

> "Les deux Gouvernements convinnent de s'en tenir en ce qui concerne les tracés des frontières séparant les territoires français et libyen, aux stipulations générales des textes internationaux en vigueur à la date de la création de l'Etat Libyen."

So the parties were already prepared, so far as the frontier line was concerned to *agree to abide by the general provisions*, that I think is a correct translation, of the international instruments in effect on the date of Libya's independence.

39. In the spring of 1955 Libya was showing a visible interest in the Laval-Mussolini Pact and was gathering in information on its possibilities, from diverse sources (see MC, No. 258). You will hear more about this from Professor Cot. In February 1955 there occurred the famous "Aozou incident" (ML, French Archives, p. 167; MC, No. 272; RC, No. 92 bis). The documentary evidence clearly shows the French concern, and the determination that the border issues, and the problems resulting from the non-ratified Laval-Mussolini Pact, must now be settled for once and for all.

40. And the next documents we see are working drafts brought by Ambassador Dejean to Tripoli for the July round of the negotiations. Article 3 of the first there specified that the two parties: "*reconnaissent* que les frontières" were "celles qui résultent des actes internationaux en vigueur" (RL, Exh. 6.6, p. 3).

As for the second, it proposed the formula "La délimitation des frontières franco-libyennes *est fixée* par les documents figurant en annexes à la présente lettre." (*Ibid.*, p. 7.)

41. So we see important changes proposed: the introduction of "recognize" to replace "agree to abide by"; and the replacement of the reference to general provisions in the instruments of

reference by "frontiers" which are "those that result from those instruments", which will be located in Annexes. So the move is to deepening legal obligation and consequence on the one hand, and to more precision on the other.

42. The second task, precision, was indeed carried out in the final version, through the specification of the instruments in a single, separate Annex, Annex I. And the Court will well know that the word "recognize", "reconnaissent" is introduced also into the exchange of letters contained within Annex I.

43. This deliberate evolution towards greater precision, on the one hand, and the firmest possible of legal commitments on the frontier on the other, is confirmed by the French documents that don't form part of the negotiating text. We know from the Note of Information (fiche d'information) coming from Paris in 1955 (MC, Ann. 245) that at this juncture it was thought useful only to introduce proposals in the broadest terms.

44. And then in May there was a meeting of French experts to prepare for the negotiations. No problems were indicated as to our portion of the frontier (RL, p. 66). What was needed was to get it firmly *recognized*, and the importance of this is shown in a letter of 14 May containing instructions from the Minister of Foreign Affairs. The satisfactory delimitation of the frontiers was it said a "condition minima" for agreement to the evacuation of the French troops from Fezzan. The instructions continue that the French delegation "Ne manquera pas de demander . . . en particulier, *la reconnaissance*, par la Libye" of "l'appartenance de certains points aux territoires français". This formula was to find its way into the Annex à propos of the reference to the three points, where we find the words: "*il a été reconnu* . . .". Libya is content to accept *that* as a binding commitment under the 1955 Treaty. As Professor Cot pointed out in his earlier pleadings, it is a strange state of affairs where "il a reconnu" is treated so differently from "ils reconnaissent"; and it illustrates the artificiality of the whole argument.

45. In a Note for the President from the Minister of Foreign Affairs of 25 July, the proposed treaty, shortly to be concluded, is explained. The summary of the provisions on the frontiers exactly match the formula that had emanated from the proposals of Ambassador Djean, to which I have

already referred.

And finally, a French document surveys the progress made between the negotiations in January 1955 and those in July-August 1955. Note is made both of the precision achieved and the achievement of the exclusion of the 1935 text:

> "(a) Enumération limittive des actes internationaux définissant les frontières, excluant les accords Laval-Mussolinin de 1935 (par conséquent renonciation de la Libye à toute prétention sur le Tibesti)."

46. Mr. President, Members of the Court, recognition went hand in hand with precision. Far from opening the door, through the introduction of academic concepts of constitutive or declaratory theory, to the possibility of emptying the 1955 Treaty of all meaning, the term indicates the irrevocable commitment of the Parties, in politics and law, to the frontiers agreed.

I do thank the Court most sincerely for its very kind attention and I would ask you, Mr. President, to call M. Cot back to the bar.

The PRESIDENT: Thank you very much Professor Higgins.

Professor Cot.

M. COT : Monsieur le Président, Messieurs de la Cour.

Mme le professeur Higgins vient de démonter le piège logique dans lequel la Partie libyenne cherchait à enfermer la Cour en la sommant de répondre à l'alternative "déclaratif ou constitutif", et en stérilisant ainsi les dispositions de l'article 3 du traité comme de son annexe I. En établissant que la volonté souveraine des parties contractantes était bien de donner un effet utile aux dispositions en question, Mme Higgins a rendu un sens à un traité qui, sans cela et sur ce point, aurait été proprement du *nonsense*. Nous connaissons le penchant de nos honorables contradicteurs pour cette forme particulière d'humour britannique, mais je doute que MM. Dejean et Ben Halim aient versé dans la plaisanterie à l'occasion de la négociation du traité du 10 août 1955.

Monsieur le Président, il nous reste maintenant à tirer les conséquences logiques de notre analyse quant à la notion de traité en vigueur au sens de l'article 3 et à répondre à une ultime critique de sir Ian Sinclair concernant la mise en œ uvre du principe de la bonne foi.

S'agissant d'abord des textes en vigueur, les hautes parties contractantes ont été droit au but.

Elles ont précisé dans l'article 3 que les actes internationaux en vigueur dont résulte la frontière sont définis à l'annexe I. Elles ont donc considéré souverainement ces actes comme étant en vigueur. Nos contradicteurs ont bâti leur théorie déclaratoire pour stériliser cette constatation et priver la claire rédaction de l'article 3 de tout sens, transformant ainsi une constatation : "les actes internationaux suivants sont en vigueur", en une condition : "les actes internationaux suivants sont applicables s'ils sont en vigueur".

Ce raisonnement, dont Mme Higgins vient de montrer l'insigne faiblesse, conduit nos adversaires à faire la démonstration que les textes de référence n'étaient pas en vigueur à la date critique et quoi qu'aient pu en penser les parties souveraines.

Dans un premier temps, nos contradicteurs, il vous en souviendra, ont prétendu que les traités conclus avec l'Italie n'étaient plus en vigueur puisqu'ils n'avaient pas été notifiés au titre de l'article 44 du traité de Paix de 1947. Ces textes devaient donc irrévocablement être tenus pour abrogés et cela permettait de régler le sort des conventions franco-italiennes de 1902 et de 1919.

Je crois avoir réfuté cet argument, le 28 juin dernier. Il est contraire au texte du traité de Paix puisque l'Italie a abandonné, par l'article 23, tout droit au titre sur ses anciennes colonies et ne peut donc être concernée par le sort des traités y afférents. Mais l'argument libyen, je le rappelais, est encore contraire à la pratique unanime des Etats concernés, aucun traité de ce type n'ayant été notifié. Enfin, nous avons noté que l'Organisation des Nations Unies elle-même a considéré ces textes comme étant en vigueur en 1950. Il semble que nos contradicteurs aient accepté notre argumentation sur ce point. Le professeur Condorelli a en effet admis, je cite :

> "le maintien en vigueur des traités bilatéraux de délimitation relatifs aux ex-colonies italiennes y compris, bien entendu, l'accord franco-italien du 12 septembre 1919" (CR 93/28, p. 51).

Je me réjouis de ce début de convergence, mais je demande encore un petit effort à nos contradicteurs. Si la Partie libyenne concède l'accord du 12 septembre 1919, elle prétend en revanche que l'échange de lettres du 1er novembre 1902, lui, est devenu caduc, indépendamment du jeu de l'article 44 du traité de Paix. Les fondements de cette caducité sont esquissés plutôt que développés par la Partie libyenne. Selon le professeur Condorelli, l'accord de 1902 serait éteint parce qu'il n'a pas été ressuscité par la résolution 289 (IV) de l'Assemblée générale de l'Organisation

des Nations Unies, n'étant pas un accord de délimitation de frontières (CR 93/28, p. 51). Pour le professeur Bowett, l'accord aurait disparu dès 1947 avec la renonciation, par l'Italie, de tous ses droits et titres sur la Libye.

Monsieur le Président, Messieurs de la Cour, j'avoue ma perplexité. L'Assemblée générale de l'Organisation des Nations Unies n'a certainement pas entendu statuer sur le maintien en vigueur ou non des traités conclus avec l'Italie et concernant ses anciennes colonies. Le professeur Franck vous a montré que le souci unique de l'Assemblée générale, sur ce point, était de favoriser une solution stable et définitive des problèmes frontaliers en laissant aux parties concernées le soin d'en fixer les modalités. La résolution 289 (IV) implique certes que des frontières ont été fixées par des traités internationaux, mais elle n'en donne pas la liste et se garde bien de se prononcer sur leur statut.

Quant à la renonciation par l'Italie à ses droits sur la Libye, elle a eu pour effet d'ouvrir la succession d'Etats, mais non de faire perdre leur "raison d'être" — pour utiliser l'expression de nos contradicteurs — aux traités dont résultent les frontières de la Libye.

Je ne reviens pas sur les accords de 1902, dont le professeur Pellet a analysé la nature juridique. Nos contradicteurs soutiennent que ces accords n'ont plus de "raison d'être" — c'est l'expression employée — parce qu'ils n'ont aucun rapport avec l'établissement d'une frontière et parce qu'ils sont exclusivement liés à la personne de l'Italie. Monsieur le Président, ces accords de 1902 ont eu pour objet de reconnaître une zone d'influence dans les frontières de la Tripolitaine telles qu'elles figurent sur la carte de 1899 — et je ne reviens pas ici sur la démonstration d'Alain Pellet. Si certaines de leurs dispositions sont incontestablement devenues caduques, leur objet territorial, lui, subsiste intégralement; il leur reste bien cette "raison d'être"-là. Au demeurant, cette controverse théorique est intéressante, mais — je me permets de le suggérer respectueusement — c'est une controverse qui, elle a perdu toute "raison d'être". Ceci depuis que la France et la Libye, le 10 août 1955, ont tranché la question. Les deux parties contractantes ont, en effet, souverainement constaté que les frontières séparant leurs territoires respectifs résultaient, entre autres, des accords de 1902.

En somme, ici comme ailleurs, c'est le critère de la volonté souveraine des parties qui règle le

problème de la succession d'Etats aux traités bilatéraux. Et cette volonté est clairement exprimée — explicitée —, s'agissant des accords de 1902.

La cause est encore plus nette pour les accords franco-britanniques de 1899 et de 1919. Nos contradicteurs n'invoquent pas leur caducité. Il n'y a pas ici de succession d'Etats. Tout au plus, la Partie libyenne a-t-elle esquissé — le trait ici est très estompé — l'argument de l'opposabilité. Ces accords ne seraient pas applicables à la Libye, car ils ne lui seraient pas opposables.

Curieux argument qui méconnaît, Mme Higgins le rappelait, la raison principale de la reconnaissance internationale : rendre un acte juridique ou une situation opposable à l'Etat qui reconnaît. Quelle que soit la nature de l'article 3 du traité de 1955 et de l'annexe I, convenons qu'ils procèdent à une reconnaissance des traités définis à l'annexe I car, sinon, ces dispositions n'auraient même pas la valeur d'une *shopping list* à quoi prétendent les réduire nos contradicteurs !

Monsieur le Président, Messieurs de la Cour, cessons de multiplier obstacles et arguties pour faire échec à la volonté des parties. La France et la Libye ont souhaité, en 1955, identifier leurs frontières en se référant aux accords franco-britanniques de 1899 et de 1919, ainsi qu'aux accords franco-italiens de 1902 et de 1919. Il s'agit de donner effet à cette volonté exprimée nettement. Il s'agit d'appliquer le traité.

Monsieur le Président, Messieurs de la Cour, pour conclure cette plaidoirie, j'en arrive à la question de la bonne foi. Vous vous souviendrez que la Partie libyenne avait mis en cause la bonne foi des négociateurs français lors du premier tour des plaidoiries, cherchant ainsi à créer un climat de suspicion pour en tirer, à la marge, un avantage en ce qui concerne l'interprétation du traité de 1955.

Nos contradicteurs ont sans doute pris en compte nos objections; ils ne sont pas revenus sur ce procès d'intention lors de leur réplique. Je leur en donne acte.

Mais sir Ian Sinclair n'a pas abandonné le thème de la bonne foi pour autant. Il a retourné l'argument et il nous dit aujourd'hui : il faut protéger la bonne foi de la Libye. Je le cite. Evoquant nos thèses, sir Ian déclare :

> "I must say that, if an argument along these lines were to appeal to the Court, it would raise some very serious questions indeed about the good faith nature of the 1955 negotiations. Libya would, on that analysis, have been induced to agree to a boundary

> by inadvertance. Libya is therefore confident that the Court would not entertain a result of this nature." (CR 93/27, p. 41.)

Et le professeur Bowett d'enfoncer le clou à sa robuste manière le 8 juillet : "no negotiations, no texts, no maps" (CR 93/29, p. 67).

Monsieur le Président, ceci n'est pas exact : il y a eu des négociations, il y a eu des textes, il y a eu des cartes et je me dois maintenant de vous en apporter les preuves.

J'utiliserai simultanément les trois sources disponibles : les dépêches diplomatiques françaises, qui sont recoupées par les documents diplomatiques du Foreign Office, ainsi que par les minutes libyennes de la négociation. La combinaison de ces sources nous permet de mieux retracer le fil de la négociation et d'écarter sans aucun doute possible la thèse suivant laquelle les Libyens auraient été conduits, par inadvertance, à accepter la frontière du Tibesti lors de la négociation finale.

La question des frontières, nous le savons, est posée dès les négociations du mois de janvier, entre le président Mendès-France et le premier ministre Ben Halim. La note française des entretiens de janvier nous apprend que le président Mendès-France, dès le 4 janvier, déclare :

> "ce qui nous paraît important, c'est ... de délimiter une frontière qui soit acceptée par les parties en cause, avec organisation en commun d'une police des frontières" (mémoire du Tchad, p. 3, annexe 239).

Et en réponse au premier ministre Ben Halim, le président du conseil français "prend note du désir libyen de clarifier la situation des frontières" (*ibid.*, p. 4).

L'objection de M. Ben Halim, à ce moment là, ne porte pas sur la délimitation des frontières, mais sur sa concomitance avec l'évacuation des troupes françaises du Fezzan.

Tout ceci est très général, me direz-vous. Non, car le problème qui se pose immédiatement à la délégation libyenne, est celui de la délimitation de notre frontière, de la frontière du Tibesti. C'est M. Wilford, de l'ambassade britannique à Paris, qui en reçoit l'information dès le 5 janvier 1955, de M. Jerbi, diplomate libyen et ancien sous-secrétaire d'Etat aux affaires étrangères, qui précise :

> "that he would be returning [Jerbi, bien sûr] to Tripoli via Rome in order that he could try to get from the italian Government the archives dealing with the Laval-Mussolini agreement of 1935, to which they were entitled and without which his government could note decide what position to take up" (réplique du Tchad. annexe 79, recoupée par le mémoire du Tchad, p. 3, annexe 245).

Le Gouvernement libyen demande donc en janvier, dès le 5 janvier, communication des

archives de la négociation de 1935, négociation qui n'a porté pour ce qui nous concerne, c'est-à-dire les frontières libyennes, que sur la frontière du Tibesti.

C'est M. Aneizi, membre de la délégation libyenne et ministre des finances, qui conduit la mission libyenne à Rome pour obtenir cette documentation (mémoire du Tchad, annexe 258). Il y rencontre sans doute des diplomates italiens; ceux-ci connaissent parfaitement le dossier, et donc un certain nombre de cartes, comme nous l'a montré avec son talent le professeur Condorelli. M. Jerbi en fait le compte rendu à M. Ravensdale, de l'ambassade britannique à Tripoli (réplique du Tchad, annexe 84) et ceci dès le 15 janvier 1955. Il sait, à ce moment-là, que l'échange des ratifications du traité de Rome n'a pas eu lieu, il n'est pas encore au clair sur les textes applicables, mais il en a discuté à Rome avec ses interlocuteurs italiens.

Par la suite, le ministère des affaires étrangères italien fait parvenir au ministère des affaires étrangères libyen le texte du traité de Rome avec les explications nécessaires (mémoire du Tchad, annexe 258). Il est dommage que nous n'ayons pas toute cette documentation qui devrait se trouver à Tripoli. En tout cas, des textes, en voilà !

Puis intervint, Monsieur le Président, l'incident d'Aozou ou de Moya, le 28 février 1955. Je ne reviens pas sur l'incident lui-même, analysé par les Parties, et notamment par le professeur Cassese. Ce qui m'intéresse, c'est la réaction du premier ministre Ben Halim.

Aozou, nous le savons, est la principale palmeraie, la principale agglomération située dans la bande qui porte son nom, M. le professeur Sorel l'a rappelé hier. Or l'incident d'Aozou du 28 février a lieu plus d'un mois après le retour de la mission spécialement envoyée à Rome pour élucider la question. La protestation française intervient à peu près au moment où l'ambassade italienne fait parvenir la documentation demandée à Rome par MM. Aneizi et Jerbi.

Il n'est pas vraisemblable, Monsieur le Président, que le premier ministre Ben Halim ait tout ignoré de la situation frontalière lorsqu'il a reconnu que le village d'Aozou se trouvait en territoire français. La mission Aneizi lui avait sûrement fait rapport. Il savait qu'Aozou était au nord de la ligne du traité de Rome de 1935. Cette ignorance est encore plus invraisemblable au mois de juin 1955 lorsque l'ambassadeur britannique à Tripoli, Graham, attire l'attention du premier ministre

sur la gravité qu'il y aurait à rééditer l'équipée du mois de février (mémoire du Tchad, annexe 264).

M. Ben Halim a eu tout loisir de s'informer, de se préparer pour les négociations qui doivent être engagées avec les Français et de son côté M. Graham n'est sûrement pas intervenu sans "biscuit", compte tenu des relations spéciales entre ces deux Etats alliés qu'étaient la Grande-Bretagne et le Royaume-Uni de Libye.

Monsieur le Président, j'en viens maintenant aux cartes. Nos contradicteurs affirment, là encore contre toute vraisemblance, je le leur dis avec respect, que les négociateurs libyens n'avaient pas de cartes. Il est très probable, nous l'avons vu, que les diplomates italiens leur en ont montré lors du voyage à Rome. On ne discute pas d'un tracé frontalier dans l'abstrait et sans cartes. M. Condorelli nous en a montré un certain nombre. Mais surtout, des cartes, nous le savons, ont été produites et discutées lors de la négociation de juillet 1955.

Car, Monsieur le Président et Messieurs de la Cour, on a bien discuté du Tibesti lors de la négociation finale, et ceci sur la base d'une carte — d'une carte produite par la délégation libyenne — et figurant sans doute la frontière du traité de Rome. C'est l'ambassadeur Dejean, conduisant la délégation française, qui en informe son ministère par le télégramme du 28 juillet. Que dit M. Dejean :

> "Alors que des Officiers libyens avaient produit hier une carte qui englobait dans la Libye un [mot passé donc qui n'a pas été retenu par la transmission] du Tibesti. M. BEN HALIM a reconnu ce matin en séance que les accords devraient leur être appliqués. Toute difficulté majeure est ainsi exclue. Il reste à se mettre d'accord sur une délimitation de la frontière entre GHAT et TOUMMO pour laquelle les textes sont d'une interprétation malaisée. Des Officiers spécialement venus de Paris s'y emploient avec des libyens au sein d'une Sous-Commission créée ce matin." (Mémoire du Tchad, annexe 268.)

Le télégramme date du 28 juillet, la carte du Tibesti a été produite par les officiers libyens le 27 juillet.

Le télégramme Dejean est confirmé par le rapport du colonel El Senoussi Latyoush en date du 4 août 1955, suite à la mission de la sous-commission mentionnée par l'ambassadeur Dejean. C'est ce rapport que vous trouverez dans votre dossier d'audience, l'*exhibit* 74 du mémoire libyen. A ce rapport sont annexées des cartes — c'est le colonel Latyoush qui l'indique — que nous n'avons malheureusement pas.

En effet, la mission des 1er et 2 août 1955, mission mixte franco-libyenne, survole la frontière entre Ghât et Toummo et consulte des représentants touareg à Ghât. De quoi s'agit-il ? Quel est l'objet de cette mission ? De comparer les tracés frontaliers portés sur deux cartes : une carte A, d'origine française, une carte B, d'origine italienne. Le colonel Latyoush sait parfaitement lire les cartes et il consacre son rapport à la comparaison détaillée entre les deux tracés. En conclusion, il recommande l'adoption du tracé porté sur la carte B.

J'ajoute que le colonel Latyoush n'ignore rien de la situation à l'est de Toummo, puisqu'il informe les représentants touareg "about the discussions of the frontier between Italy and France in the year 1935". Il note que la France avait alors cédé du territoire à l'Italie, mais que le traité de Rome n'était jamais entré en vigueur. Si la mission Latyoush, les 1er et 2 août 1955, n'évoque pas la frontière à l'est de Toummo et ne survole pas le Tibesti, c'est que la question a déjà été réglée le 28 juillet précédent, nous venons de le voir.

Mais, Monsieur le Président, la Partie libyenne aura du mal à vous convaincre, Messieurs les juges, qu'un colonel, patriote, féru de cartographie et souhaitant rouvrir le dossier des frontières — c'est une autre des ses conclusions — se soit passionné pour les cartes à l'ouest de Toummo et se soit désintéressé des cartes à l'est de Toummo !

D'autant qu'ici nous avons un dernier indice, que je trouve dans l'*exhibit* 73 du mémoire libyen, ces minutes libyennes de la négociation de juillet que nos contradicteurs ont fourni sur le tard. Nous y retrouverons le colonel Latyoush. Il est présent dans la négociation. Il est présent le 28 juillet au matin, avant l'ouverture de la séance. Pour quoi faire ? Pour présenter son rapport sur les frontières du Fezzan. Il est fort probable que c'est le colonel Latyoush en personne qui a présenté, la veille, la carte du Tibesti qui a fait bondir l'ambassadeur Dejean, puisque c'est l'officier cité dans les minutes que consigne la Partie libyenne de la négociation. Tout ceci se tient, Monsieur le Président.

Les cartographes militaires français et libyens ont participé à la négociation, à la discussion sur la frontière du Tibesti sur la base de cartes, et notamment la carte fournie par les officiers libyens. Puis, ce problème ayant été réglé, ils sont partis ensemble sur le terrain survoler le secteur

Toummo-Ghât pour parachever l'accord en cours de négociation.

Voilà donc pour les cartes !

Les sources en provenance des trois origines — française, britannique, libyenne — sont concordantes. Ces mêmes sources nous permettent de reconstituer la phase finale de la négociation qui n'est pas du tout celle décrite par sir Ian Sinclair et le professeur Bowett. Les Français veulent obtenir, nous l'avons vu, la consécration de la frontière du Tibesti sur la base de la ligne de l'accord franco-britannique du 8 septembre 1919. Les Libyens ne le veulent pas. Le premier ministre Ben Halim essaie d'éviter que le traité envisagé ne règle la question. Et il ne s'y résigne, nous le savons, que le 28 juillet, au lendemain de la discussion qui s'est nouée autour de la carte du Tibesti produite par les officiers libyens.

Ce sont les minutes libyennes, l'*exhibit* 73, qui nous l'apprennent : "pas de frontière, pas de traité" s'exclame l'ambassadeur Dejean, vous vous en souvenez. L'ambassadeur Dejean met ainsi le marché en mains au premier ministre Ben Halim. Le premier ministre accepte le marché, il accepte la frontière du Tibesti, de mauvaise grâce peut-être, mais en toute connaissance de cause. Ce résultat précis est consigné à la fois dans les dépêches françaises et dans les dépêches britanniques. Du côté français, j'ai signalé la dépêche Dejean du 28 juillet. Elle est confirmée par une dépêche du même ambassadeur, en date du 9 août 1955 (réplique libyenne, annexe 6.6). Du côté britannique, citons la dépêche envoyée par l'ambassadeur Graham, ambassadeur britannique à Tripoli, au ministre des affaires étrangères Harold MacMillan, le 30 juillet 1955 :

> "The Libyan representatives, who throughout the negotiations were far more conciliatory and anxious to reach an agreement than the French had dared to hope, admitted freely that the frontiers should be based on the international agreements in force at the time Libya gained her independance. They conceded apparently with a wry smile, that the Laval-Mussolini agreement of 1935 was nugatory." (Réplique du Tchad, annexe 120.)

M. Ben Halim a bien cédé sur la question du Tibesti. Sans doute avec un "wry smile", mais en pleine connaissance de cause et en échange d'avantages obtenus par ailleurs dans le cadre de l'accord d'ensemble.

Le premier ministre Ben Halim a probablement été critiqué pour cette concession dans son propre pays. Dès le 4 août 1955, le colonel Latyoush, nous le voyons, souhaite que la négociation

soit rouverte sur l'ensemble des frontières. En 1956, ce que j'appellerai le parti révisionniste, celui qui cherche la révision de l'accord, revient à la charge. Et nous le savons, la délégation libyenne demande en novembre 1956 la réouverture du dossier. Nous savons aussi que la délégation française refuse et qu'elle motive son refus par l'existence du traité du 10 août 1955 qui a déjà réglé le problème (contre-mémoire de la Libye, par. 3.110). La délégation libyenne s'incline : *pacta sunt servanda*.

Je conclus, Monsieur le Président, Messieurs de la Cour.

On ne peut pas dire qu'il n'y a pas eu de négociation sur la frontière du Tibesti en 1955. La question a été soulevée dès le premier jour par le président Mendès-France et le premier ministre Ben Halim. La question a fait l'objet d'un règlement explicite dans la phase finale des négociations, le 28 juillet 1955. Et entre-temps, le Gouvernement libyen s'est informé de la situation auprès du Gouvernement italien et, probablement auprès du Gouvernement britannique. En tous cas, nous le savons, il a disposé de textes, il a disposé de cartes et il a conclu en connaissance de cause. "Negotiations, texts, maps", it's all there, Professor Bowett.

Dernière question, le premier ministre Ben Halim : a-t-il commis une faute en signant, puis en faisant ratifier le traité du 10 août 1955 ? Certains l'ont pensé, nous l'avons vu, dès avant la signature du traité. D'autres le pensent aujourd'hui, sans doute de l'autre côté de la barre ! Mais, Monsieur le Président, Messieurs de la Cour, laissons cela aux historiens. C'était à l'époque affaire d'appréciation politique, c'est devenu une question historique. Mais la question de l'appréciation faite, en 1955, par le premier ministre libyen des intérêts de son pays dans la négociation n'a jamais et à aucun moment été un problème juridique. J'ajoute que cette appréciation-là, qui échappe à notre compétence, ne pouvait être portée qu'au vu du résultat d'ensemble d'une négociation, dont je constate par ailleurs qu'elle a été menée avec intelligence et avec obstination par les négociateurs libyens.

Monsieur le Président, Messieurs de la Cour, je crois que nous avons retourné toutes les pierres dans cette affaire au cours des longues plaidoiries que vous avez eu la patience d'écouter. Nous avons examiné tous les aspects du traité du 10 août 1955 avec l'aide de nos amis et contradicteurs de la Partie libyenne. Nous restons persuadés, pour notre part, que la clef de toute

cette affaire se trouve dans la simple application d'un traité conclu entre deux Etats souverains en pleine connaissance de cause, le traité du 10 août 1955. J'espère que nous vous en avons convaincus.

Monsieur le Président, avant de vous prier d'appeler l'agent de la République du Tchad à la barre, vous me permettrez de prononcer les remerciements d'usage, puisque je suis le dernier conseil de notre équipe à m'exprimer.

Mes remerciements à nos collègues et contradicteurs, à qui je veux dire notre admiration pour le talent déployé dans la défense d'une cause difficile — elles sont toutes difficiles —, et notre salut au terme d'une joute qui n'a pas entamé nos liens d'estime.

Nos remerciements au Greffier de la Cour, à tout le personnel, aux interprètes, et je veux leur témoigner de notre gratitude pour leur compétence et leur gentillesse.

Nos remerciements, si vous me le permettez, à vous Monsieur le Président et à vous Messieurs de la Cour, puisque vous avez eu cette attention redoutable, vigilante et somme toute bienveillante au cours de ces semaines.

Monsieur le Président, je vous prie maintenant d'appeler à la barre l'agent de la République du Tchad, le recteur Abderahman Dadi.

The PRESIDENT : Thank you very much Professor Cot. Monsieur le recteur Dadi, vous avez la parole.

M. DADI : Monsieur le Président, Messieurs les juges.

Ces audiences s'achèvent. La Libye a déjà conclu. C'est, aujourd'hui, le tour du Tchad, mais avant de prononcer les conclusions formelles, je souhaiterais dire quelques mots, à la suite des plaidoiries libyennes du second tour.

La Libye a persisté dans des allusions à "l'indépendance purement formelle" du Tchad.

Permettez-moi, Monsieur le Président, de dire simplement que le Tchad est un membre, à part entière, de la communauté internationale.

Et on ne saurait, par allusions ou insinuations, diminuer son statut d'Etat souverain, d'autant plus que le Tchad a été — et demeure — bien vulnérable face aux menaces d'un puissant voisin, qui se trouve être la Libye elle-même.

Monsieur le Président, si le peuple libyen existe, le peuple tchadien aussi. Peuple libyen et peuple tchadien sont égaux en dignité et ont les mêmes droits.

Quant au Toubou, partie intégrante et composante active du peuple tchadien, ils n'étaient pas plus senoussi qu'ils ne sont aujourd'hui libyens. L'histoire établit clairement, fermement.

Je suis Toubou, mais je ne me suis jamais senti Libyen ni n'ai envisagé mon avenir de l'autre côté de la frontière.

Monsieur le Président, les choses sont simples : la Libye et le Tchad sont deux Etats voisins, tous deux de très grands pays en superficie, respectivement 1 760 000 kilomètres carrés et 1 284 000 kilomètres carrés, très peu peuplés, quatre millions et cinq millions d'habitants; leur frontière commune est bien délimitée. Leurs relations doivent être envisagées à l'aune des nécessités qu'implique tout voisinage.

Le Tchad veut vivre en bonnes relations avec ses voisins, mais il entend rester maître chez soi. Ses difficultés politiques internes ? Il saura les surmonter en trouvant en lui-même les ressources nécessaires. Ce dont le peuple tchadien a vraiment besoin, c'est de paix et de respect de son intégrité territoriale et non du démembrement de son pays pour assouvir les rêves de grandeur d'un voisin.

Maintenant voici les conclusions finales du Tchad :

La République du Tchad prie respectueusement la Cour internationale de Justice de dire et juger que sa frontière avec la Jamahiriya arabe libyenne est constituée par la ligne suivante :

— du point d'intersection du 24° degré de longitude est de Greenwich avec le parallèle 19° 30′ de latitude nord, la frontière se dirige jusqu'au point de rencontre du tropique du Cancer avec le 16° degré de longitude est de Greenwich;

— de ce dernier point, elle suit une ligne se dirigeant vers le puits de Toummo jusqu'au 15° degré est de Greenwich.

Encore deux mots, Monsieur le Président, pour mettre un point final à mon intervention.

1. Je voudrais à mon tour, saluer l'agent, et les membres de l'équipe de la Libye pour leur cordialité durant ces longues plaidoiries.

2. Je voudrais aussi remercier, à nouveau publiquement, les éminents juristes qui ont aidé le Tchad à présenter sa thèse devant votre Cour ainsi que leurs collaborateurs. Ils l'ont fait avec compétence, dévouement et en renonçant à une part importante des honoraires qui sont d'usage.

Cela est un témoignage concret de solidarité avec un pays démuni comme le Tchad, qui a bénéficié aussi d'une aide du Fonds d'affectation spéciale des Nations Unies pour laquelle je souhaite exprimer ici la reconnaissance du Gouvernement tchadien.

Monsieur le Président, Messieurs les juges, je vous remercie de votre patiente attention et vous souhaite de bonnes vacances.

The PRESIDENT : Merci beaucoup, Monsieur le recteur Dadi. That brings us to the end of the oral proceedings in the present case between Libya and Chad and on behalf of the Court I would like to express our thanks to the Agents and the counsel of both Parties for the very great assistance they have given the Court in their conduct to these proceedings. In accordance with the usual practice I have to ask the Agents to remain at the disposal of the Court for any further information the Court may require.

There is the question of the question put by Judge Guillaume to Libya on 3 July. That written answer has I believe been provided already in the course of this morning to the Registrar and in accordance with Article 72 of the Rules a copy of the reply will be communicated to Chad which will be given an appropriate opportunity of commenting upon it if they wish to do so.

So the Court will now withdraw to deliberate on the case and the Agents will in due course be notified of the date when the decision will be given. Subject to the reservations I mentioned I therefore now declare the oral proceedings in this case at an end. Thank you very much.

The Court rose at 12.35 p.m.

PUBLIC SITTING OF 3 FEBRUARY 1994, 3 P.M.

READING OF THE JUDGMENT

THE PRESIDENT: The sitting is open.

The Court meets today in order to read in open court, in accordance with Article 58 of the Court's Statute and Article 94 of the Rules of Court, its Judgment in the case concerning the *Territorial Dispute* between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad. The proceedings in the case were instituted in August 1990, under a special agreement between the Parties described as the *Accord-Cadre*, and after exchanges of substantial written pleadings, oral proceedings were held in June and July 1993. The Court, having deliberated, has now to deliver its decision.

Two Members of the Court, Judges Tarassov and Aguilar Mawdsley, are unfortunately prevented by ill-health from being present at today's sitting. They did however participate in all stages of the proceedings in the case and in the final vote.

The authoritative text of today's Judgment is the French text, but in accordance with practice and with Article 39, paragraph 2, of the Statute, the decision is given in both official languages, French and English, and it is the English text that I shall read.

The opening paragraphs of the Judgment deal with the procedural history of the case, and as is customary, I shall not read them. The Court then begins by noting the terms in which the dispute has been presented to it by the two Parties; and continues:

[The president reads paragraphs 19 to 77 of the Judgment[1].]

THE PRESIDENT: I now call upon the Registrar to read the operative part of the Judgment in French.

[The Registrar reads the operative part in French[2].]

THE PRESIDENT: Judge Ago appends a declaration to the Judgment of the Court; Judges Shahabuddeen and Ajibola append separate opinions; and Judge *ad hoc* Sette-Camara appends a dissenting opinion.

As is customary, the Judgment has been read today from a typewritten text, of which a very limited number of copies is available for the Parties, the press and the public. The usual printed edition of the Judgment, in the form in which it will appear in the Court's *Reports*, will be available in three to four weeks time.

There being no further business before the Court today, I declare the sitting closed.

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[1] *I.C.J. Reports 1994*, pp. 14-40.

[2] *Ibid.*, p. 40.

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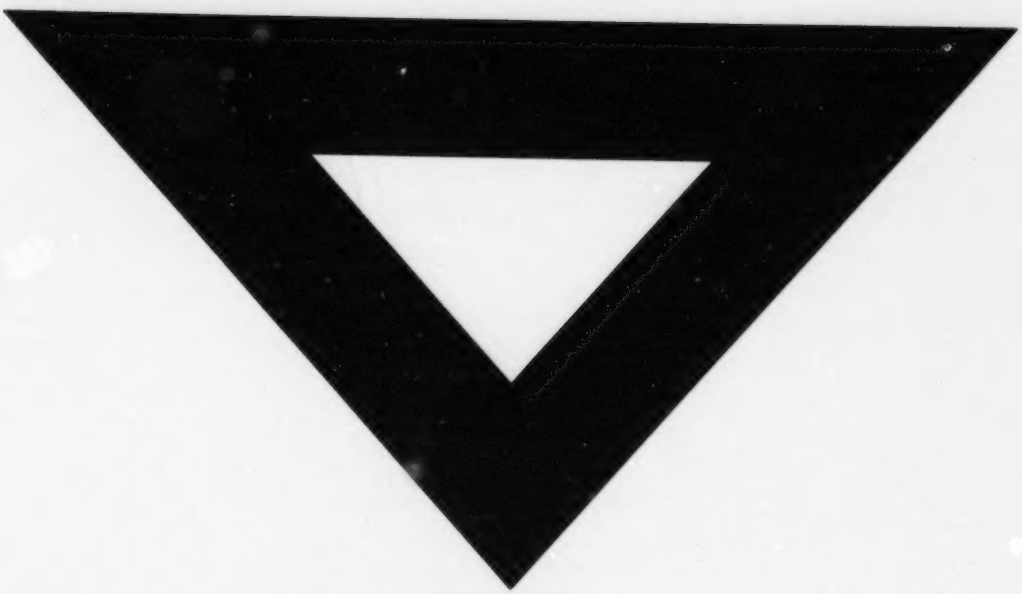
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